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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-462

DONALD S. WEIR, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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No.

DONALD S. WEIR, JR.,

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v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on February 16, 1973.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*) is reported at 474 F.2d 617. The Report of Commissioner To The Court, filed May 11, 1972 (App. C, *infra*) is not reported

JURISDICTION

The judgment of the Court of Claims, printed in Appendix A, was entered on February 16, 1973. Timely Motion for Reconsideration and rehearing was denied on May 11, 1973. By Order dated the First day of July 1973, the Chief Justice granted petitioner's application for an extension of time within which to file petition for a Writ of Certiorari, to and including September 9, 1973. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 147(b), Rules of the United States Court of Claims, violates petitioner's right to due process of law under the Fifth Amendment of the Constitution?

2. Whether the Court below abused its discretion in substituting its own opinion for that of the Trial Commissioner who, after an extended trial, saw and heard the witnesses, examined the evidence and concluded that the Army had not followed its own validly-enacted regulations?

3. Whether the Court below made a "moral judgment" rather than a "legal judgment" based on factors other than those in evidence?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution. The statutes concerned are portions of 10 U.S.C. 3811(b), pertaining to the statutory authority for discharge. The rules are those portions of Rule 147(b), Rules of the United States Court of Claims, and Rule 52(a) of the Federal Rules of Civil Procedure. The regulation is that portion of Army Regulations No. 635-89, dated 8 September 1958, as amended, pertaining to

Personnel Separations, Homosexuals. Applicable portions of the above-cited references have been extracted, reproduced and added in the Appendix.

STATEMENT OF THE CASE

On October 12, 1965 petitioner Donals S. Weir, Jr., then an enlisted man in the Army as a PVT E-2, was demoted and discharged from the Army with an Undesirable Discharge, DD Form 258, "Under Conditions Other Than Honorable", after serving less than 10 months of a three year enlistment begun on January 5, 1965. He had reported pursuant to a draft call and was induced to enlist for a three year term by the recruiting personnel on the representation that with three years rather than as a two year inductee the Army could find something suitable for him.

Weir's service up until August had been "excellent", however frustrations with menial duty assignments, seriously disruptive personal family problems, and deteriorating emotional distress temporarily obscured his judgment to the breaking point where he initiated a fiction to expedite an immediate release from the Army. The vehicle he chose was to pose as a man with homosexual tendencies which he feared would get him in trouble with the Army. He was not nor has ever been a homosexual. With the assistance of the chaplain who arranged an appointment with a newly-graduated and newly-assigned clinical psychologist at the Mental Hygience Consultation Service, after a casual conversation while walking across the parking lot, Weir had a 45 minute interview with a man he believed to be a psychiatrist. At this point in life the petitioner was in dire need of help from a professional psychiatrist, something which was not forthcoming. On the contrary the

the interview with a young, inexperienced clinical psychologist "went along swimmingly" and the interviewee had the distinct impression that the interviewer "was playing along with his little game". A second interview one week later with the same interviewer and an additional man present petitioner later learned was a psychiatrist was merely a replay of the first.

The Report of Psychiatric Evaluation, dated August 20, 1965, prepared by the interviewing clinical psychologist, and signed by the medical doctor psychiatrist, based on the patient's unverified statement was the only investigation made by the Army. Not even Weir's immediate superior and supervisor, a senior NCO with more than 35 years of service, knew of the problem until he was processing the separation papers on the day of discharge.

It is uncontroverted that the Army accepted petitioner's fabrication, *i.e.*, one made by a young man with serious emotional problems, with no verification of any sort contrary to their own regulations.

Following his discharge and restoration to more stable emotional maturity in civilian environment, Weir realized the severe impact on his life which resulted from his impetuous and improvident action. He exhausted his administrative remedies through the Army without relief and filed action in the Court of Claims alleging his reduction and discharge were invalid since the Army failed to follow its own regulations in effecting the discharge and reduction in grade.

After a three day trial on the merits[1] during which

[1] Petitioner's cause was limited to entitlement only since under the theory of "set-off", any civilian earnings would have to be set off against the final award. The recovery will be minimal.

time the trial commissioner heard a number of witnesses in California and in Washington, his Opinion, filed on May 11, 1972, found for the petitioner, holding that the Army had not followed its own regulations. The decision of the Court below followed exceptions taken by the Army and a summary hearing before that Court.

REASONS FOR GRANTING THE WRIT

1. The court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

In holding that there was no error of law and that the Army Board for the Correction of Military Records' decision is correct, the Court of Claims has decided a federal question in a way in conflict with applicable decisions of this Court. The principle has been firmly established that the Executive Departments and Agencies of the Government are bound by the terms of their own regulations and administrative procedures.[2] The same principle has been applied to an investigative committee of Congress.[3] Under the provisions of the applicable Army Regulation,[4] "Individuals who seek to avoid military service by unverifiable assertion of homosexuality", *will not be processed under this regulation.* Further, there is requirement that: "A commanding officer receiving information that an individual under his command is a homosexual or has

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[2] See: U.S. ex rel. *Acardi v. Shaughnessy*, 347 U.S.260 (1954); *Service v. Dulles*, 354 U.S. 363 (1957); and *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

[3] See: *Yellin v. U.S.*, 374 U.S. 109 (1963).

[4] See: Army Regulations 635-89, Paragraph 2b(1) [App. E].

engaged in an act of homosexuality, *will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case,* * * *".[5] (Emphasis added)

2. The decision of the Court of Claims has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision

To permit the Court below to overturn the considered opinion of the trial commissioner who had the opportunity to see and hear the witnesses and to examine the evidence in detail is an abuse of discretion. It establishes an overly-broad application of Rule 147(b), Rules of the United States Court of Claims,[6] and provides a significant distinction with Rule 52(a) of the Federal Rules of Civil Procedure,[7] a rule with a somewhat similar purpose pertaining to the findings of fact by the trial judge hearing the case without a jury, or a master.

3. The Court of Claims has decided a federal rule which has not been, but should be, settled by this Court

So far as can be determined this Court has not previously considered the interpretation of Rule 147(b), Rule of the Court of Claims. However, this Court has

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[5] See: Army Regulations 635-89, Paragraph 4b [App. E].

[6] See Appendix E.

[7] See Appendix E.

on numerous occasions addressed itself to the application of Rule 52(a), of the Federal Rules of Civil Procedure.[8] In each case, this Court has unequivocally stated the deference to be accorded the trier of the fact, "who is usually in a superior position to appraise and weigh the evidence". It is this principle of law which petitioner prays this Court to consider and make a determination similar to that expressed as pertains to Rule 52(a), Federal Rules of Civil Procedure. Anything less is a denial of due process.

4. The questions are substantial and have a wide range of application

The Court of Claims has by this decision overturned the considered opinion of the trier-of-the-fact which followed the long-established precedent determined by this Court over the years. In so doing it has destroyed an important principle of law which has a wide range of application, not only to vast numbers of servicemen,[9] but to a broad spectrum of civilians. This decision could affect thousands of our citizens who have come to look to the Courts to protect them from the bureaucratic vagaries of the executive departments and agencies

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[8] See: *Zenith Radio v. Hazeltine*, 395 U.S. 100, 123 (1969); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *U.S. v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *U.S. v. Yellow Cab*, 338 U.S. 338, 341 (1949); *N.L.R.B. v. Pittsburgh Steamship Co.*, 337 U.S. 656, 660 (1949); and *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 393-395 (1948).

[9] Official Department of Defense statistics for fiscal years 1950 through the first six months of 1973 reveal more than 425,000 "Undesirable Discharges" were issued for all of the military services, not including the Coast Guard, female members of the Army for years prior to 1961, and those issued by the Air Force for 1950 through 1956.

interpreting their own regulations and administrative procedures. For the unsuspecting, the unwarry and those victims of misfortune, misadventure or lack of familiarity with the "administrative process", the perils are formidable.[10]

The decision, if allowed to stand, would create a total disarray in the orderly administration of justice.

5. The decision of the Court of Claims threatens to emasculate due process of law

Due process "is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith".[11] It "demands only that that the law shall not be unreasonable, arbitrary or capricious",[12] and that the protection of the individual from arbitrary action is the very essence of due process of law".[13]

It has to do with "the denial of fundamental fairness shocking to the universal sense of justice; it deals neither with the power nor the jurisdiction, but with their exercise."[14]

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[10] See: Rethinking the 'Bad Discharge' System, by Raymond P. Boulanger, Appendix F.

[11] Groppi v. Leslie, 404 U.S. 496, 500 (1972).

[12] Nebbia v. New York, 291 U.S. 502, 525-526 (1934).

[13] Ohio Bell Telephone v. Commission, 301 U.S. 292, 302 (1937).

[14] Kinsella v. U.S., 361 U.S. 234, 246 (1960).

"The better and larger definition of due process of law is that it means law in its regular course of administration."[15]

6. The Court of Claims made a "moral" judgment rather than a "legal" one

The decision punishes for an unfortunate indiscretion on strictly "moral" grounds apart from the legal issues involved. Petitioner has freely admitted his offense for which he has endured eight years of personal indignities to his life, self-respect and career.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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15 Lord Kent, Commentaries on American Law, Vol. II, 12th Ed. (1896).

16 See: Rethinking the 'Bad Discharge" System, App. F.

APPENDIX A

In the United States Court of Claims

No. 358-69

(Decided February 16, 1973)

DONALD S. WEIR, JR. v. THE UNITED STATES

Carl J. Felth, attorney of record for plaintiff.
James F. Merow, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

OPINION

KUNZIG, *Judge*, delivered the opinion of the court:*

In issue in this military pay case is whether the refusal of the Army Board for the Correction of Military Records (the Board) to upgrade plaintiff's "discharge under conditions other than honorable", is an error of law, where plaintiff is a fully competent, adult soldier with self-confessed homosexual tendencies, confirmed by psychiatric evaluation.

We hold there is no error of law and the Board's decision is correct.

Further in issue is whether plaintiff is estopped from obtaining a judgment for back pay on his subsequent, sworn claim that he lied to the Army to obtain a discharge, and that the Army improperly failed to ascertain that he lied.

We conclude plaintiff is so estopped. Having chosen voluntarily to announce himself under oath as a man with homosexual tendencies to avoid military duty, he cannot now be heard to complain of the consequences of his choice.

*We are indebted to Trial Commissioner William E. Day for his findings of fact, which have been adopted in their near entirety, and for his recommended opinion, though we have substituted our own in reaching a different result.

Only the question of entitlement is presently before this court, both parties having agreed to limit this phase of the case to the question of plaintiff's right to recover, leaving *quantum*, if any, for further proceedings.

Plaintiff was born in 1942 in New Jersey. He graduated from Hamilton College in 1964, did a brief tour in the Peace Corps before being selected out during training as unsuitable, and then was, for a short time, successful as a real estate salesman in California. Early in 1965 plaintiff enlisted in the Army for three years in lieu of responding to the draft. After training as a power generator specialist, he was assigned to a missile battalion at Fort Hancock, New Jersey as a clerk in the battalion orderly room.[1]

Sometime prior to August 12, 1965, plaintiff talked with the base chaplain and told him that he feared his homosexual inclinations would get him into difficulty with men in the barracks. Plaintiff was thereafter examined twice at the Mental Hygiene Consultation Service. First, a competent clinical psychologist, Lt. Rudy, examined him. Then both Lt. Rudy and a competent psychiatrist, Dr. Weltner, examined him at a second session.[2]

On August 20, 1965, a report was prepared which made a psychiatric evaluation of plaintiff concluding he was fully competent and responsible for his actions. Elimination from the service was recommended with the diagnosis "sexual deviation—homosexuality." On August 24, 1965, plaintiff was informed by a Major Rollins that he was an investigating officer conducting an investigation of homosexual activity. Major Rollins informed plaintiff of his legal rights. Plaintiff then made a sworn statement reading in pertinent part as follows:

> I, Donald S. Weir, Jr., RA19824015, have been counseled and advised of the basis of action recommended. I have a copy of the Commanding Officer's report and copies of statements submitted to support the recommendations for elimination and the names of prospective witnesses to appear or to submit statements that will be used against me.

[1] A position which would require a security clearance.

[2] While under psychiatric examination, plaintiff described his homosexual contacts since entering military service as having occurred with civilians and as being promiscuous, *i.e.* plaintiff rarely had more than a single contact with a homosexual partner.

I have been offered counsel and I have declined to accept this offer.

I hereby waive hearing before a board of officers. I understand that if he, [sic] convening authorities direct a discharge, I will not be given another opportunity to appear before a board of officers before being discharged.

I would like to make the following statement.

I testify that I have a problem with homosexual tendencies which predates my coming on active duty with the US Army. These tendencies have trailed in my background since I was about nine (9) years old. Sporadically, these homosexual feelings supplant what society calls normal heterosexual activities. I have not engaged in these activities with military personnel at either this station or at my previous ones, Fort Belvoir and Fort Polk, respectively. Generally, these engagements were with casual acquaintances whom I have met while on either leave or pass. Since these tendencies could occur in the future, I believe my mission for the US Army would be impaired.

On August 31, 1965, plaintiff executed a further statement waiving a hearing before a board of officers and acknowledging he was aware of the adverse effect a "discharge under conditions other than honorable" might have upon him in subsequent civilian life:

> I hereby waive hearing before a board of officers under AR 635–89 and accept discharge for the good of the service. I understand that my separation from the Army may be effected by a discharge under conditions other than honorable; that I may be deprived of many rights and benefits as a veteran under both Federal and State law; and, that I may expect to encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

Plaintiff was discharged from the service because of homosexuality, as a Class II Homosexual, as outlined in AR 635–89 [3] on October 12, 1965. He was reduced in rank to the

[3] AR 635–89 as amended by Change 1, April 14, 1959 and Change 2, January 22, 1960 reads in pertinent part:

SECTION I

GENERAL

1. Purpose. These regulations prescribe the authority, criteria, and procedures for the disposition of military personnel who are homosexuals or alleged homosexuals.

lowest enlisted grade and discharged "under conditions other than honorable".[4]

After failing to obtain relief in various forums below, plaintiff now comes before this court stating that he carefully planned and fabricated the story to get out of the Army.

---

2. Policy. a. Homosexual personnel irrespective of sex will not be permitted to serve in the Army in any capacity, and prompt separation of homosexuals, as defined in these regulations, is mandatory. Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society.

b. The following classes of persons will not be processed under the provisions of these regulations:

(1) Individuals who seek to avoid military service by an unverifiable assertion of homosexuality.

(2) Those individuals who solely as a result of immaturity, curiosity, or intoxication have been involved in homosexual acts. Such individuals who are not eliminated from the service by sentence of court-martial and who are considered inept, unsuitable, or undesirable by reason of immaturity, alcoholism, or other character and behavior disorders may be eliminated from the service under other applicable regulations.

(3) In those rare cases in which homosexual acts are symptomatic of an incapacitating mental illness such as psychosis, medical treatment will be provided and separation from the service by reason of the primary medical condition will be made, if indicated.

• • • • •

3. Definitions. For the purpose of these regulations the following definitions apply:

a. *Homosexual.* An individual, regardless of sex, who demonstrates by behavior a preference for sexual activity with persons of the same sex.

b. *Homosexual act.* Bodily contact between persons of the same sex actively undertaken or passively permitted with the intent of obtaining sexual gratification, or any proposal, solicitation, or attempt to perform such an act.

c. *Class I.* Class I consists of those cases which involve an invasion of the rights of another person, as when the homosexual act is accompanied by assault or coercion, or where the person involved does not willingly cooperate in or consent to the homosexual act, or, if the act is cooperated in or consented to, where the cooperation or consent was obtained by fraud. Class I also includes cases which involve a homosexual act with a child under the age of 16 years, without regard to whether the child cooperated in or consented to such an act.

d. *Class II.* Class II consists of those cases in which homosexual military personnel have engaged in one or more homosexual acts not within the purview of class I during active military service. Class II also includes all cases falling within class I in which it is determined not to prefer charges, or, if charges are preferred, not to refer them to a court-martial for trial, or such cases where trial is held but does not result in a punitive discharge. No distinction is made in the administrative handling of these cases involving homosexual acts because of the active or passive nature of the conduct of the participants.

e. *Class III.* Class III consists of those cases in which the homosexual individual involved has not engaged in a homosexual act during active military service, and those cases otherwise within the purview of these regulations but not falling within the purview of classes I or II.

• • • • •

He admits he lied under oath at the 1965 investigation and psychological and psychiatric examinations. Nevertheless plaintiff seeks:

1. A money judgment paying him for the remaining period of his enlistment.	(Although, as a result of his own fabrication, he never served any of this time and actually earned nothing.)
2. Restoration to his rightful grade.	("Rightful" is his allegation.)
3. Consideration for a promotion to which he would have been entitled.	(Although, again, as a result of his own fabrication, he wasn't in the service, so obviously couldn't have earned promotion.)
4. Alteration of his military record to give him an honorable discharge.	(Because the Army owed him some sort of duty to find out he was lying, that he was not a homosexual after all, and that he was merely trying to avoid military service.)

Surely, this must be the outstanding example of *chutzpah* to the n^{th} degree.

During the intervening years after being discharged, plaintiff had taken no action in this matter whatsoever. A dismissal from employment, after it was found that he had falsified his service record, crystallized his desire to change the character of his discharge. He now seeks relief in this court.

SECTION II

PROCEDURES

4. Responsibility. *a.* It is the duty of every member of the military service to be alert to situations affecting discipline, morale, or security of the military forces. In this connection, overt homosexuality is not to be condoned, and when discovered, will be reported immediately through command channels to the commanding officer having jurisdiction over the individual concerned.

b. A commanding officer receiving information that an individual under his command is a homosexual or has engaged in an act of homosexuality, will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges. * * *

[4] Plaintiff served only nine months and eight days, a substantial part of which had been spent being trained at government expense.

There are two major issues in this case: the first being whether the defendant erred in not following its own discharge procedures properly; and the second being whether, in any event, plaintiff is estopped from asserting procedural error. We hold for the defendant on both points, each being able to stand on its own as alone justifying our decision.

I

Plaintiff argues that the Army failed to follow its own procedural regulations. AR 635–89, Section 2a does not permit homosexuals of either sex to serve in the Army in any capacity. Prompt separation of homosexuals is mandatory. However, Section 2b (1) adds that individuals who seek to avoid military service by an unverifiable assertion of homosexuality will not be processsed under this regulation. Thus, whether plaintiff must be discharged under AR 635–89 depends upon interpretation of the phrase, "unverifiable assertion of homosexuality". Section 4b of the same regulation attempts to clarify what the Army must do to verify. Its principle, lead sentence is as follows:

> A commanding officer receiving information that an individual under his command is a homosexual or has engaged in an act of homosexuality, will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges.

Plaintiff, in effect, contends that these regulations, together, require a comprehensive investigation, going perhaps into community life, past experiences, even college and school episodes. One might well question whether his enthusiasm for investigation would have been as great back in 1965.[5] An "investigation" is clearly what plaintiff did not want if his present testimony that this was a fraud on the Army is to be credited. That an admission of homosexuality, confirmed by psychological and psychiatric examinations, might well be considered "verification" seems beyond his comprehension.

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[5] Nor is there any evidence here that plaintiff, who now blames the Army for not "investigating far enough", offered to cooperate in any way by giving names, addresses, dates, etc.

In addition, the phrase "malicious charges", suggests that this part of the regulation was aimed at preventing vicious denunciations and libelous charges of sexual deviation *by or against third parties*. The very sentence in which these words occur clearly refers to the situation where charges are made that a third party is a homosexual, not where an individual admits it by sworn statement. A self-admission by a fully-competent adult cannot possibly come within the "malicious charges" warning contained in the exact same sentence.[6] Language such as appears in this regulation should be given a common sense interpretation. *Siegel* v. *United States*, 84 Ct. Cl. 551, 18 F. Supp. 771 (1937).

Then, too, since modern, enlightened thinking regards homosexuality as an illness, not a crime, even more logical is an interpretation which would require psychological evaluation, rather than a criminal investigation . . . when the homosexual is self-confessed. Clearly, plaintiff knew his discharge might be other than honorable and that he might encounter substantial prejudice in later civilian life due to his admitted homosexuality. He signed a statement to that effect. Not a scintilla of evidence suggested at that time that he was lying.

Finally, an interpretation that sworn admission of homosexuality plus psychiatric confirmation is sufficient for military discharge is in accord with long-standing agency interpretation. JAGA 1960/4901 (October 28, 1960), Comment No. 2. Therefore, both for the reason that the agency's established interpretation of the regulation is entitled to considerable weight, *Barrington Manor Apartments Corp.* v. *United States*, 198 Ct. Cl. 298, 459 F. 2d 499 (1972); *Cornman* v. *United States*, 187 Ct. Cl. 486, 409 F. 2d 230 *cert. denied* 396 U.S. 960 (1969), and that the regulation, reasonably interpreted cannot be said to require the Army to conduct an investigation of plaintiff's military associates or prior college and business associates especially where there was absolutely

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[6] Plaintiff's argument would reach the unsupportable result of placing a much greater investigative burden on the Army in accepting a self-admission of homosexuality than is placed on a Federal District Court judge in accepting a plea of guilty in a criminal action. *Weaver* v. *United States*, 454 F. 2d 315 (7th Cir. 1971); *United States* v. *Risso*, 362 F. 2d 97 (7th Cir. 1966).

no indication that plaintiff was lying,[7] we conclude that there was no procedural violation, but rather full adherence to appropriate Army regulations. A sworn admission of homosexuality plus psychiatric confirmation is sufficient to satisfy the provisions of AR 635–89.[8]

II

It has long been a standing principle in this court that the conduct and admissions of a party operate against him in the nature of an estoppel when the other party detrimentally relies upon that conduct or those admissions. *Mahoning Investment Co.* v. *United States*, 78 Ct. Cl. 231, 246, 3 F. Supp. 622, 629 (1933), *cert. denied* 291 U.S. 675 (1934). In the *Mahoning* case it was clearly stated that

> [T]he vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is *sternly forbidden.* It involves fraud and falsehood, and the law abhors both.

Id.

There is no doubt in the instant case that the government took a position detrimental to itself when it relied upon the 1965 statements of the plaintiff and granted a premature discharge from the Army to a man who had been trained at government expense. The government is thus clearly entitled to invoke the doctrine of equitable estoppel to prevent the

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[7] The belief that fabrication about homosexuality is the easiest "escape route" from the service is not necessarily the case.

> It is a curious and interesting commentary on the general prejudice against homosexuals and the desire to eliminate them from the service that there would coexist a widespread belief held by responsible persons—then as today—that many individuals might profess homosexuality in order to evade (or seek a discharge from) military service. Such beliefs persist despite obvious evidence of a widespread and deep-rooted revulsion against homosexuality which would preclude the utilization of such evasive methods by non-homosexuals, particularly when more socially acceptable forms of simulation (*e.g.*, physical illness) can be employed.

L. West & A. Glass, *Sexual Behavior and the Military Law*, in Sexual Behavior and the Law 250, 254 (R. Slovenko ed. 1965); *see generally* Comment, *Homosexuals in the Military*, 37 Fordham L. Rev. 465 (1968–69).

[8] This situation is not unlike a Conscientious Objector who is excused from certain military service because of his own beliefs without further substantiation. *cf. Welsh* v. *United States*, 398 U.S. 333 (1970).

plaintiff from profiting from his earlier fabrications. The doctrine of equitable estoppel is an old doctrine to which we continue to adhere. *Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 194, 394 F. 2d 990, 1003 (1968).

Plaintiff himself was content to be processed under the regulation as it was administered and most certainly benefited by the type of verification that was employed. He gained his discharge, yet was not then subject to public disclosure of his alleged problem. Plaintiff is subsequently estopped after he had benefited from the regulation and its implementation from claiming that something was amiss. *Henneberger* v. *United States*, 187 Ct. Cl. 265, 267, 407 F. 2d 1340 (1969).

In light of the foregoing, we conclude that plaintiff is not entitled to recover. The petition is hereby dismissed.

NICHOLS, *Judge*, concurring:

I join in the opinion and findings of the court, but desire to add a few words. It appears to me the really basic error Commissioner Day fell into was his disregard of the rule that a litigant seeking to take advantage of the failure of an agency to follow its own regulations, must show that the regulation involved was made to protect persons in the litigant's class. The rule is discussed, and cases cited, in *Chris Berg, Inc.* v. *United States*, 192 Ct. Cl. 176, 426 F. 2d 314 (1970). As there stated, if a regulation appears intended to define and state the rights of a class of persons, it is presumptively intended to benefit those persons. Insofar as the regulations here involved required independent corroboration of a competent soldier's assertion of his own homosexuality, it appears to me they were intended to prevent avoidance of military service by false confessions. Such a purpose is not compatible with protection of the individual soldier, and indeed as Judge Kunzig rightly points out, could have required an investigation which might have forced plaintiff to defend himself against serious criminal charges, if plaintiff's present interpretation is correct.

It would be a perversion of the judicial process for plaintiff to prevail in this action. However, I do not wish what is said about the claim herein to prejudice plaintiff at that time which sooner or later must come, when those who have resorted to means of avoiding military service even as bizarre

as this, or more so, come under consideration for executive or legislative clemency.

Findings of Fact

The court, having considered the evidence, the Report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of the State of California.

2. Plaintiff was born on December 4, 1942, at Long Branch, New Jersey, and resided in Matawan, New Jersey, until he was 14 years old. His family then moved to Bethel, Connecticut. Bethel remained his residence until 1964.

3. Plaintiff attended Hamilton College, then a small liberal arts men's institution located in upstate New York. He played on the Hamilton varsity football team for 3 years, sang in the college choir and served as an officer of his social fraternity.

4. At Hamilton College, plaintiff had intended to prepare himself for further study in the field of medicine, having expressed interest in psychiatry. Difficulties in introductory courses in biology and mathematics convinced him to abandon his goal. He graduated with a major in English literature.

5. While in his senior year at Hamilton, plaintiff made application to the Peace Corps, and received notice in May 1964 that he had been accepted as a trainee. Following graduation in June of 1964, he reported to Davis, California, for preliminary training. He was selected out of the program in July of that year, due (according to the plaintiff) to his inflexibility and low tolerance for frustration.

6. After severance from the Peace Corps training program, plaintiff decided to remain in California. He obtained a position with a residential building firm in Woodland, California. In his employment with this firm he displayed energy and desire to succeed as a commission salesman and enjoyed corresponding financial success, earning upwards of $1,000 per month.

7. After having worked for the aforementioned firm for only a short time, plaintiff was directed by his draft board to report for his preinduction physical.

8. In the hope of receiving a better assignment as a volunteer than he would have received through the draft, plaintiff enlisted in the Army on January 5, 1965, for a 3-year tour of duty.

9. Plaintiff was sent to Fort Polk, Louisiana, for basic training. Because of low mechanical aptitude scores, plaintiff was discouraged from applying for officers training school. In March 1965, following basic training, plaintiff was transferred to Fort Belvoir, Virginia, for power generator specialist schooling—which assignment did not coincide with plaintiff's desires. On May 5, 1965, the plaintiff was promoted to E–2 grade.

10. In the spring of 1965 plaintiff applied for an assignment with Army Intelligence. He went to Fort Holabird for tests and interviews, and was notified that he was being considered for transfer.

11. On July 14, 1965, upon completion of his training at Fort Belvoir, plaintiff was assigned to a missile battalion at Fort Hancock, New Jersey. His earliest assignment at Fort Hancock was custodial care of the base.

12. Plaintiff was interviewed at Fort Hancock by Sgt. Maj. Melvin H. Bonsall and was chosen to serve under him as a clerk in the battalion orderly room.

13. Assignment to a missile battalion at Fort Hancock, New Jersey required a security clearance.

14. During his 4 years at Hamilton College, plaintiff had developed a warm friendship with Julian Engleman, the father of one of his college classmates. Plaintiff had often visited the Engleman home in Connecticut during college vacations, and had been counseled on several occasions by Mr. Engleman when personal problems had arisen.

15. Some time prior to August 12, 1965 plaintiff visited the Engleman home in Connecticut and told Mr. Engleman of plaintiff's intention to inform Army authorities that he is a homosexual, in order to be discharged from the service. The plaintiff related to Engleman that he found it impossible to conform to Army life, that he objected to taking orders, and that the entire routine was one to which he felt he could not adjust.

16. Perceiving that plaintiff was in an agitated state, Mr. Engleman counseled him not to pursue his contemplated

course of action, pointing out the serious consequences of such a stain on his record.

17. Plaintiff carefully planned his fabrication of homosexuality after learning that it was an easy way to win a discharge from the service.

18. Through his work in the orderly room, plaintiff became acquainted with one of the chaplains (Maj. Reginald J. Huebner). Some time prior to August 12, 1965, plaintiff talked with Maj. Huebner while walking across a parking lot on the base and told the chaplain that he feared that homosexual inclinations he had might get him into difficulty with the men in his barracks.

19. Upon being informed of plaintiff's homosexual inclinations, the chaplain made an appointment for him to discuss the matter with an officer of the Mental Hygiene Consultation Service at Fort Monmouth, New Jersey.

20. On August 12, 1965, plaintiff was examined for 45 minutes at the Fort Monmouth Mental Hygience Consultation facility by a duly qualified psychologist, Lt. Arthur J. Rudy.

21. On August 19, 1965, plaintiff was again examined (for 45 minutes to an hour) by Lt. Rudy. Capt. John S. Weltner, M.D. (chief of the Mental Hygiene Consultation Service, Fort Monmouth, New Jersey) was also present.

22. Capt. Weltner commenced his active duty service in June 1964 as a psychiatrist (MOSC 3129). Weltner received his medical training at Harvard University. Prior to entering the service, he had treated patients since 1961 as a resident in training at the Massachusetts Mental Health Center and at the James Jackson Putnam Children's Center.

23. The report of psychiatric evaluation dated August 20, 1965, prepared in regard to plaintiff, reads in pertinent part as follows:

> 1. WEIR, Donald S. Jr., PVT. RA 19 824 015, HQS BTRY, 3/51, Ft. Hancock, N.J.
>
> * * * * *
>
> has been examined and evaluated at the Mental Hygiene Consultation Service, Fort Monmouth, New Jersey on 12 & 19 Aug 1965.
>
> 2. Psychiatric evaluation indicates that:
>
> (a) The diagnosis in this case is: Sexual Deviation, homosexuality (3206).

(b) This patient has no physical or mental disability sufficient to warrant separation under provisions of AR 635-40 A & B.

(c) This patient was and is mentally responsible both to distinguish right from wrong and to adhere to the right, and has the mental capacity to understand and participate in Board Proceedings.

8. Conclusions: Pvt. Weir was referred to MHCS by Chaplain Heubner. Pvt. Weir had approached the Chaplain because he was fearful that his homosexual inclinations would get him into difficulty with men in his barracks. During the course of his psychiatric evaluation, Pvt. Weir indicated that his homosexual activity began when he was nine years old. He suggested that he had several homosexual experiences when he was in high school, even more frequent homosexual contacts when he was in college. After college, this 22 yr. old E-2, spent two years in California working as a Real Estate salesman. Again during this period of time, he was involved in several homosexual affairs. Since entering the service, Pvt. Weir indicates that he has had four homosexual contacts—all of these being with civilians who lived in the nearby community. He notes that all his homosexual contacts have been typified by his tendency toward "promiscuity", that is, he rarely has had more than a single contact with a homosexual partner. Dynamically it appears that his homosexuality is related to the fact that Pvt. Weir has longed for but never had a stable family situation with a father whom he could both love and respect. Although his parents were legally divorced when he was in college, he indicates that father was always in and out of the house—separated at frequent intervals from the family—and not particularly interested in a stable marital or parental relationship. He tears easily when he talks about his mother and sister and the deprivation that they, along with himself, have suffered because of his father's neglect. He has attempted to compensate for father's lack of attention by striving at one level for power—he describes himself as a "super-rocket" who was capable of earning $25,000 per year when he left college and is capable of even greater things in politics or finance. Yet, he questions whether he is really the "super-rocket" that others think he is—he suggests that he feels like "half a rocket"—"empty inside".

At the present time, Pvt. Weir is greatly concerned because he doesn't know just who he is. He sees himself as fluctuating between the "straight" (non-homosexual) world and the "gay" (homosexual) world. Again, he is

torn between his drive for the realization of his ambition for power and his feeling that he would like to develop a stable family situation—he sees these last as mutually exclusive. Finally, Pvt. Weir, because of his difficulties with his father, has found himself quite distressed in the military—especially when he has to take orders from people just a little older than he is—and in this regard, finds himself very angry a good part of the time. He feels that when his anger overwhelms him, he turns toward homosexuality.

In addition to his homosexual difficulties, Pvt. Weir also reflects long-term characterological problems—passive-aggressiveness, and strong dependency concerns. Mental status examination reveals a bright, 22 yr. old, whose verbalizations, while most often, quite appropriate and goal directed, are sometimes marked by inappropriate word usage and mild loosening of associations. Although mildly depressed, affect is appropriate. It is felt that Pvt. Weir is responsible for his actions.

It is recommended that Pvt. Weir be eliminated from the service under provisions of AR 635–89.

(s) J. Weltner
JOHN S. WELTNER,
Captain, MC, Chief, MHCS.
(s) Arthur J. Rudy
ARTHUR J. RUDY,
1/Lt, MSC, Clinical Psychologist.

24. Unless some physical health problem becomes evident to the psychiatrist during the evaluation session, it was Dr. Weltner's opinion that it would be unusual to refer the subject to another medical specialist. Plaintiff was not so referred. In the case of alleged homosexuality, it was Dr. Weltner's opinion that no medical inquiry beyond that of a psychiatric evaluation would have had relevance. Further, it was his opinion that in determining homosexuality, there were no psychological testing procedures which would have been superior to the direct questioning procedures utilized in plaintiff's case.

25. Dr. Weltner testified that in smaller clinics (like the one at Fort Monmouth) a clinical psychologist is expected to treat patients, and to perform functions similar to those of a psychiatrist.

26. Dr. Weltner testified that Lt. Rudy [1] had prepared the psychiatric evaluation of plaintiff. It was customary procedure for Rudy to write up a patient's report of psychiatric evaluation, which would then be reviewed by Weltner in his capacity as chief of the Mental Hygiene Consultation Service at Fort Monmouth.

27. Dr. Weltner could not recall the precise number of homosexual cases which came to his attention in his 2-year tour of duty as chief of the Mental Hygiene Consultation Service at Fort Monmouth. However, he was certain that the number was between 3 and 20, including the instant case.

28. Dr. Weltner could not recall whether or not he knew in August of 1965 the extent to which Lt. Rudy was familiar with and experienced in dealing with homosexual cases. Weltner stated that in the period in which he had supervised Rudy's work, he thought Rudy had investigated between 3 and 20 such cases, including that of the plaintiff.

29. Dr. Weltner testified that while he was serving at Fort Monmouth, personnel in the Mental Hygiene Consultation Service were aware of the possibility that some men might falsely claim that they were homosexuals in order to be relieved of their military obligation.

30. Subsequent to his Army service, Dr. Weltner has had experience with individuals who have claimed to be homosexuals in order to avoid military service.

31. Relying solely upon the information contained in the subject report, Dr. Weltner's opinion is that plaintiff was telling the truth during the second interview. Weltner based his conclusion on the grounds that:

(a) In his opinion, plaintiff's personal history was consistent with his claim of homosexuality.

(b) In Weltner's opinion, there are two items noted in the subject report which were impossible to simulate.

32. The two items which Weltner identified were inappropriate word usage and loosening of associations. The section

[1] In Dr. Weltner's opinion, Lt. Rudy was an outstanding clinician, and upon the recommendation of Dr. Weltner, Rudy received the Army Commendation Medal for his services at the Mental Hygiene Consultation Service at Fort Monmouth.

of the aforementioned report which notes these phenomena reads as follows:

> In addition to his homosexual difficulties, Pvt. Weir also reflects long-term characterological problems—passive-aggressiveness, and strong dependency concerns. Mental status examination reveals a bright, 22 yr. old, whose verbalizations, while most often, quite appropriate and goal directed, are sometimes marked by inappropriate word usage and mild loosening of associations. Although mildly depressed, affect is appropriate. It is felt that Pvt. Weir is responsible for his actions.

33. Prior to his discharge from the Army, plaintiff visited his mother in a New York hotel room where she was staying prior to departure for California. Mrs. Weir described her son's condition at the time as being one of emotional distress. It was difficult for her to follow his incoherent sentences. Plaintiff informed her that he had fabricated a story that he was a homosexual in order to be discharged from the Army, and that his story had been believed by the Army authorities. Mrs. Weir remonstrated with plaintiff stating that such a course of conduct would have a profound effect on his future and urging that it would be better to tell the Army that he had lied and to accept the consequences.

34. Army Regulations No. 635-89 (dealing with personnel separations of homosexuals), dated September 8, 1958,[2] state in pertinent part as follows:

SECTION I

GENERAL

1. **Purpose.** These regulations prescribe the authority, criteria, and procedures for the disposition of military personnel who are homosexuals or alleged homosexuals.

2. **Policy.** *a.* Homosexual personnel irrespective of sex will not be permitted to serve in the Army in any capacity, and prompt separation of homosexuals, as defined in these regulations, is mandatory. Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which

[2] These regulations were amended by Change 1, April 14, 1959 and Change 2, January 22, 1960.

appreciably limits the ability of such individuals to function effectively in society.

b. The following classes of persons will not be processed under the provisions of these regulations:

(1) Individuals who seek to avoid military service by an unverifiable assertion of homosexuality.

(2) Those individuals who solely as a result of immaturity, curiosity, or intoxication have been involved in homosexual acts. Such individuals who are not eliminated from the service by sentence of court-martial and who are considered inept, unsuitable, or undesirable by reason of immaturity, alcoholism, or other character and behavior disorders may be eliminated from the service under other applicable regulations.

(3) In those rare cases in which homosexual acts are symptomatic of an incapacitating mental illness such as psychosis, medical treatment will be provided and separation from the service by reason of the primary medical condition will be made, if indicated.

* * * * *

3. **Definitions.** For the purpose of these regulations the following definitions apply:

a. Homosexual. An individual, regardless of sex, who demonstrates by behavior a preference for sexual activity with persons of the same sex.

b. Homosexual act. Bodily contact between persons of the same sex actively undertaken or passively permitted with the intent of obtaining sexual gratification, or any proposal, solicitation, or attempt to perform such an act.

c. Class I. Class I consists of those cases which involve an invasion of the rights of another person, as when the homosexual act is accompanied by assault or coercion, or where the person involved does not willingly cooperate in or consent to the homosexual act, or, if the act is cooperated in or consented to, where the cooperation or consent was obtained by fraud. Class I also includes cases which involve a homosexual act with a child under the age of 16 years, without regard to whether the child cooperated in or consented to such an act.

d. Class II. Class II consists of those cases in which homosexual military personnel have engaged in one or more homosexual acts not within the purview of class I during active military service. Class II also includes all cases falling within class I in which it is determined not to prefer charges, or, if charges are preferred, not to refer them to a court-martial for trial, or such cases where trial is held but does not result in a punitive discharge.

No distinction is made in the administrative handling of these cases involving homosexual acts because of the active or passive nature of the conduct of the participants.

c. Class III. Class III consists of those cases in which the homosexual individual involved has not engaged in a homosexual act during active military service, and those cases otherwise within the purview of these regulations but not falling within the purview of classes I or II.

* * * * *

35. The above regulations further provide:

SECTION II

PROCEDURES

4. **Responsibility.** * * *

b. A commanding officer receiving information that an individual under his command is a homosexual or has engaged in an act of homosexuality, will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges. Flagging action will be initiated in accordance with AR 600–31. When the report of investigation does not substantiate the allegation of homosexuality or the commission of a homosexual act, the case will be closed and flagging action under AR 600–31 removed. When the report of investigation substantiates such allegations, the commanding officer will—

(1) Refer the individual for medical evaluation (par. 9).

(2) Upon receipt of the medical evaluation of the individual concerned, and in the absence of a major mental illness, determine under which class the case should be processed by comparing the facts with the definitions of class I, II, and III, and then process the case accordingly.

* * * * *

9. **Documentation of cases.** It is essential that all facts indicating homosexual tendencies or acts be recorded properly, and that signed statements of all witnesses be obtained (see UCMJ, Art. 31). In all cases, including those in which the immediate commanding officer requests board action, the report will include the statement of the individual's date of birth; the amount of active service of the individual concerned; the date and period of the individual's current period of service; state-

ments of witnesses; a copy of general court-martial charges and investigations under Article 32, when applicable; the resignation letter of the individual concerned or a signed statement by the enlisted person regarding acceptance of discharge; a detailed signed statement from the individual concerned (in class III cases) relative to his tendencies and any past homosexual actions, or his statement to the effect that he does not desire to make a statement; and the commanding officer's detailed comments and recommendations. Also included with the file will be a medical evaluation, including psychiatric study of the individual concerned. An adequate medical evaluation will include as a minimum:

a. Personal history, including, if any, a detailed account of development of homosexuality.

b. Report of mental status examination.

c. Psychiatric diagnosis, if any.

d. Opinion regarding the existence of homosexuality. (No recommendations will be made concerning the classes of homosexual cases defined in par. 3.)

e. Statement as to mental responsibility.

* * * * *

g. Recommendation regarding medical disposition of the case, if any.

h. Statement as to whether there are any medical contraindications for administrative disposition.

* * * * *

i. A copy of the medical evaluation to include the psychiatric study will be filed with the individual's health record.

* * * * *

36. On August 24, 1965, plaintiff executed a sworn statement, reading in pertinent part, as follows:

I, Donald S. Weir, Jr., RA19824015, have been counseled and advised of the basis of action recommended. I have a copy of the Commanding Officer's report and copies of statements submitted to support the recommendations for elimination and the names of prospective witnesses to appear or to submit statements that will be used against me.

I have been offered counsel and I have declined to accept this offer.

I hereby waive hearing before a board of officers. I understand that if he, [sic] convening authorities direct a discharge, I will not be given another opportunity to appear before a board of officers before being discharged.

I would like to make the following statement.

I testify that I have a problem with homosexual tendencies which predates my coming on active duty with the US Army. These tendencies have trailed in my background since I was about nine (9) years old. Sporadically, these homosexual feelings supplant what society calls normal heterosexual activities. I have not engaged in these activities with military personnel at either this station or at my previous ones, Fort Belvoir and Fort Polk, respectively. Generally, these engagements were with casual acquaintances whom I have met while on either leave or pass. Since these tendencies could occur in the future, I believe my mission for the US Army would be impaired.

37. On August 31, 1965, plaintiff executed a further statement, waiving a hearing before a board of officers, as follows:

I hereby waive hearing before a board of officers under AR 635–89 and accept discharge for the good of the service. I understand that my separation from the Army may be effected by a discharge under conditions other than honorable: that I may be deprived of many rights and benefits as a veteran under both Federal and State law; and, that I may expect to encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

38. The plaintiff's battery commander, on August 23, 1965, sent a letter to the Commanding Officer, 3rd Missile Battalion, 51st Artillery, Fort Hancock, New Jersey, which reads as follows:

1. UP AR 635–89 recommend PVT E2 Donald S. Weir Jr., RA 19824015, a member of this unit be discharged from the service.

2. The following personnel [sic] data is submitted:

a. Donald S. Weir Jr., PVT E–2 RA 19824015, 22 years old, enlisted 5 January 1965 for a period of three (3) years with no prior service.

3. This recommendation is based on the following information:

a. PVT E2 Weir admits to homosexual interest and has expressed a continued desire to participate in homosexual activities. (See Report of Examination and Evaluation, inclosure 1, and PVT Weir's statement inclosure 2.)

b. AFQT Score: 62

c. Aptitude Area Scores: EL: 121, GM: 83, MM: 109, CL: 132, GT: 130, RC: 119, IN: 125, and AE: 113.

d. CONDUCT: Unsatisfactory. EFFICIENCY: Excellent.

By first endorsement the addressee sent the above-quoted letter to higher authority, the Commanding Officer, 19th Artillery Group (AD), Highlands Air Force Station, Highlands, New Jersey, in words which read:

1. Recommend that Private Weir be discharged from the service UP of AR 635–89.

2. EM has been counseled and advised of the basis for the action recommended UP AR 635–89 and has been afforded the opportunity to be represented by counsel, an opportunity which he declines.

3. EM has submitted written statements which are attached as inclosures 2 and 3.

By further endorsements the letter reached the Commanding General, Headquarters, 1st Region, United States Army Air Defense Command, Fort Totten, Flushing, Long Island, New York, who placed the following endorsement thereon, through channels to the 3rd Missile Battalion at Fort Hancock, New Jersey:

1. Approved.

2. Private Donald S. Weir, Jr., RA 19 824 015, will be discharged from the service because of Homosexuality, as a Class II Homosexual, as outlined in paragraph 3d, AR 635–89.

3. Providing enlisted man is not already in the lowest enlisted grade, he will be immediately reduced thereto, in accordance with para 13, AR 635–89 and para 31e, AR 624–200.

4. DD Form 258A (Undesirable Discharge) will be furnished. The reason and authority for separation to be entered in item 11c, DD Form 214, will be "AR 635–89, SPN 257." To preclude reentry into the U.S. Army, "Para 10, AR 601–210 applies", will be entered in item 32, DD Form 214. Reenlistment Code RE–4 will be entered above item 1 on DD Form 214.

39. Following his discharge from the Army, plaintiff returned to California. Although he had been advised by Lt. Rudy, Capt. Weltner and his mother to seek professional psychiatric advice, plaintiff did not follow such a course of action.

40. In California, plaintiff obtained a sales position with

a division of the same residential building firm for which he had worked prior to his enlistment in the Army. It is not clear why he left. Later plaintiff obtained various positions in retail sales and as a tax assessor. Some time prior to May 8, 1968, he applied for a position as a sales representative with the Xerox Corporation. In his application for this position he falsified his service record. After a number of interviews he was hired, only to be dismissed shortly thereafter when the results of the company's check of the plaintiff's military record proved unfavorable.

41. As a result of this dismissal from Xerox Corporation, plaintiff decided to attempt to change the character of his discharge.

42. On May 8, 1968, plaintiff (by counsel) filed an Application for Review of Discharge or Separation from the Armed Forces of the United States, requesting that the Army Discharge Review Board upgrade his undesirable discharge.

43. A hearing was held on plaintiff's application at which time testimony was taken from Tyrone Brown, a college associate of plaintiff.

44. In addition to the testimony of Tyrone Brown, plaintiff presented to the Board a number of affidavits and letters from friends, relatives, associates, educators and employers.

45. On September 11, 1968, the Army Discharge Review Board denied plaintiff's request that his discharge be upgraded, finding that "THE APPLICANT WAS PROPERLY DISCHARGED."

46. On October 3, 1968, plaintiff petitioned the Army Board for Correction of Military Records, requesting that his "[d]emotion to Pvt. E–1, and administrative discharge UNDER CONDITIONS OTHER THAN HONORABLE, DD Form 258, be corrected to reflect actual character of service." Plaintiff presented to the Board the record of the proceedings before the Army Discharge Review Board and requested a hearing before the Board.

47. On May 28, 1969, plaintiff's application was denied by the Army Board for Correction of Military Records, without a hearing as had been requested by the plaintiff.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

U S GOVERNMENT PRINTING OFFICE: 1973

COURT OF CLAIMS MAY 14 1973

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

358-69	DONALD S. WEIR, JR.	)	
213-70	ROBERT SIMMONS CONSTRUCTION CO., INC.	)	
444-70	ROLAND DORL	)	v. THE UNITED STATES
528-71	WILLIAM J. BENDER	)	
847-71	DAVID H. BARAL	)	

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

These cases come before the court on motions for reconsideration, rehearing, new trial, to strike affidavit and for further relief under Rules 151 and 152 of the rules of this court and, on consideration thereof,

IT IS ORDERED this 11th day of May, 1973, that said motions be and the same are denied as follows:

358-69 Donald S. Weir, Jr. Plaintiff's motion for reconsideration and rehearing.

847-71 David H. Baral. Plaintiff's motion for reconsideration.

BY THE COURT

Chief Judge

APPENDIX C

In the United States Court of Claims

No. 358-69

(Filed MAY 11 1972)

DONALD S. WEIR, JR. v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

Carl J. Felth, attorney of record for plaintiff.
James F. Merow, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

OPINION

DAY, *Commissioner:* In this military pay case, the plaintiff (an enlisted man in the Army) was discharged from the service as undesirable as a class II homosexual, and reduced in rank. He sues for pay of his rank before reduction claiming that the discharge was invalid since the Army failed to follow its own regulations in effecting the discharge and reduction in rank. Before filing the action here, he sought relief before the Army Discharge Review Board and the Army Board for the Correction of Military Records, where relief was denied. At pretrial, the parties agreed that the trial of this case be limited to the issues of fact or law relating to the plaintiff's right to recover, reserving the amount, if any, for further proceedings.

Detailed and separately stated findings of fact follow this opinion. It is appropriate now only to summarize those facts which are necessary to a resolution of the legal issues before this court.

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 134(h).

464-323—72——1

Plaintiff attended Hamilton College, a liberal arts institution in upper New York State where he participated in campus social, cultural and athletic activities. Plaintiff had intended to begin to prepare himself at Hamilton for a career in medicine, having an expressed interest in psychiatry. Difficulties with introductory courses in mathematics and biology precipitated a change to a major in English literature.

Following graduation from Hamilton in June 1964, plaintiff reported to Davis, California, for preliminary training as a Peace Corps volunteer. Plaintiff was "selected out" of this program on the basis of his inflexibility and low tolerance for frustration (according to plaintiff). After severance from the Peace Corps training program, plaintiff obtained a position with a residential building firm in Woodland, California. He met with immediate success as a commission salesman, earning upwards of $1,000 per month.

Shortly after the inception of his sales career, plaintiff was directed by his draft board to report for a preinduction physical. In the hope of receiving a better assignment as a volunteer, plaintiff enlisted in the Army on January 5, 1965.

Following basic training at Fort Polk, Louisiana, plaintiff was transferred to Fort Belvoir, Virginia, for power generator specialist schooling. He was promoted to E–2 grade on May 5, 1965. On July 14, 1965, upon completion of his training, plaintiff was assigned to a missile battalion at Fort Hancock, New Jersey.

Some time prior to August 12, 1965, plaintiff spoke with a base chaplain as the latter was walking across a parking lot. Plaintiff told the chaplain that he feared his homosexual inclinations might get him into difficulties with the men in the barracks. The chaplain referred the plaintiff to the Mental Hygiene Consultation Service at Fort Monmouth, New Jersey.

On August 12, 1965, plaintiff was examined for 45 minutes at the Fort Monmouth facility by Lt. Arthur J. Rudy a clinical psychologist. One week later, on August 19, 1965, plaintiff was again examined for 45 minutes to an hour by Lt. Rudy. Capt. John S. Weltner, M.D., chief of the Mental Hygiene Consultation Service at Fort Monmouth was also present on August 19.

A Report of Psychiatric Evaluation dated August 20, 1965, was prepared in regard to plaintiff. That document reads in pertinent part, as follows:

1. WEIR, Donald S. Jr., PVT, RA 19 824 015, HQS BTRY, 3/51, Ft. Hancock, N.J.

* * * * *

has been examined and evaluated at the Mental Hygiene Consultation Service, Fort Monmouth, New Jersey on 12 & 19 Aug 1965.

2. Psychiatric evaluation indicates that:

(a) The diagnosis in this case is: Sexual Deviation, homosexuality (3206).

(b) This patient has no physical or mental disability sufficient to warrant separation under provisions of AR 635-40 A & B.

(c) This patient was and is mentally responsible both to distinguish right from wrong and to adhere to the right, and has the mental capacity to understand and participate in Board Proceedings.

3. *Conclusions:* Pvt. Weir was referred to MHCS by Chaplain Huebner. Pvt. Weir had approached the Chaplain because he was fearful that his homosexual inclinations would get him into difficulty with men in his barracks. During the course of his psychiatric evaluation, Pvt. Weir indicated that his homosexual activity began when he was nine years old. He suggested that he had several homosexual experiences when he was in high school, even more frequent homosexual contacts when he was in college. After college, this 22 yr. old E-2, spent two years in California working as a Real Estate salesman. Again, during this period of time, he was involved in several homosexual affairs. Since entering the service, Pvt. Weir indicates that he has had four homosexual contacts—all of these being with civilians who lived in the nearby community. He notes that all his homosexual contacts have been typified by his tendency toward "promiscuity", that is, he rarely has had more than a single contact with a homosexual partner. Dynamically it appears that his homosexuality is related to the fact that Pvt. Weir has longed for but never had a stable family situation with a father whom he could both love and respect. Although his parents were legally divorced when he was in college, he indicates that father was always in and out of the house—separated at frequent intervals from the family—and not particularly interested in a stable marital or parental relationship. He tears easily when he talks about his mother and sister and the deprivation that

they, along with himself, have suffered because of his father's neglect. He has attempted to compensate for father's lack of attention by striving at one level for power—he describes himself as a "super-rocket" who was capable of earning $25,000 per year when he left college and is capable of even greater things in politics or finance. Yet, he questions whether he is really the "super-rocket" that others think he is—he suggests that he feels like "half a rocket"—"empty inside".

At the present time, Pvt. Weir is greatly concerned because he doesn't know just who he is. He sees himself as fluctuating between the "straight" (non-homosexual) world and the "gay" (homosexual) world. Again, he is torn between his drive for the realization of his ambition for power and his feeling that he would like to develop a stable family situation—he sees these last as mutually exclusive. Finally, Pvt. Weir, because of his difficulties with his father, has found himself quite distressed in the military—especially when he has to take orders from people just a little older than he is—and in this regard, finds himself very angry a good part of the time. He feels that when his anger overwhelms him, he turns toward homosexuality.

In addition to his homosexual difficulties, Pvt. Weir also reflects long-term characterological problems—passive-aggressiveness, and strong dependency concerns. Mental status examination reveals a bright, 22 yr. old, whose verbalizations, while most often, quite appropriate and goal directed, are sometimes marked by inappropriate word usage and mild loosening of associations. Although mildly depressed, affect is appropriate. It is felt that Pvt. Weir is responsible for his actions.

It is recommended that Pvt. Weir be eliminated from the service under provisions of AR 635–89.

(s) J. Weltner
JOHN S. WELTNER,
Captain, MC, Chief, MHCS.
(s) Arthur J. Rudy
ARTHUR J. RUDY
1/Lt, MSC, Clinical Psychologist.

A psychiatric evaluation generally consists of a psychiatrist interviewing the patient from one to three times to obtain information concerning the patient's background and concerns. This information then provides the basis upon which to formulate a diagnosis. Dr. Weltner testified that in the smaller clinics (like that at Fort Monmouth), a clinical psychologist is expected to treat patients, and to perform

functions similar to those of a psychiatrist. Lt. Rudy prepared the above-quoted psychiatric evaluation of plaintiff. It was customary procedure for Lt. Rudy to write up a patient's psychiatric evaluation, which would then be reviewed by Dr. Weltner in his capacity as chief of the Mental Hygiene Consultation Service at Fort Monmouth.

Lt. Rudy did not testify at the trial of this matter as he could not recall any additional matters which were not included in the subject psychiatric evaluation report. Dr. Weltner was called by the defense. However, he had no substantial independent recollection of the second interview which formed a part of the basis for the aforesaid report. He could not recall what part he had taken in the subject interview. He maintained it was his custom to propound questions to the patient and that he and Rudy had probably discussed the case after the second session. His primary recollection was that the interview had occurred.

On August 24, 1965, the paintiff executed a sworn statement waiving a hearing before a board of officers and further stating:

* * * * *

> I testify that I have a problem with homosexual tendencies which predates my coming on active duty with the US Army. These tendencies have trailed in my background since I was about nine (9) years old. Sporadically, these homosexual feelings supplant what society calls normal heterosexual activities. I have not engaged in these activities with military personnel at either this station or at my previous ones, Fort Belvoir and Fort Polk, respectively. Generally these engagements were with casual acquaintances whom I had met while on either leave or pass. Since these tendencies could occur in the future, I believe my mission for the US Army would be impaired.

* * * * *

On September 23, 1965, the commanding officer, Headquarters 1st Region, United States Army Air Defense Command, Fort Totten, New York, ordered that:

> * * * Private Donald S. Weir, Jr., * * * will be discharged from the service because of Homosexuality, as a Class II Homosexual, as outlined in paragraph 3d, AR 635-89.

* * * * *

The above order also provided that plaintiff was to be immediately reduced in rank to the lowest enlisted grade in accordance with AR 635–80 and AR 624–200. Effective October 5, 1965, plaintiff was reduced in grade from private E–2 to private E–1, and on October 12, 1965, plaintiff was discharged from the United States Army with an undesirable discharge.

On May 8, 1968, plaintiff (by counsel) filed an Application for Review of Discharge or Separation from the Armed Forces of the United States, requesting that the Army Discharge Review Board upgrade his undesirable discharge. After a hearing, on September 11, 1968, the Army Discharge Review Board denied plaintiff's request that his discharge be upgraded, finding that "THE APPLICANT WAS PROPERLY DISCHARGED." On October 3, 1968, plaintiff petitioned the Army Board for Correction of Military Records, that his "[d]emotion to Pvt. E–1, and administrative discharge UNDER CONDITIONS OTHER THAN HONORABLE, DD Form 258, be corrected to reflect actual character of service." On May 28, 1969, plaintiff's application was denied.

Plaintiff petitioned this court on August 26, 1969. Trial was held in Sacramento, California, on October 26 and 27, 1971, and in Washington, D.C., on December 13, 1971. Briefs, requested findings of fact and objections were filed by April 5, 1972.

In his petition, plaintiff alleges that in effecting his discharge as a class II homosexual, the Army failed to follow its own procedural regulations. Plaintiff's petition states in part as follows:

> Plaintiff prays that he be awarded a money judgment by this Court in an amount of $3,156.90, more or less, and that his official military records be corrected to reflect the following:
>
> (1) That plaintiff's discharge on 12 October 1965, be voided as being without legal effect.
>
> (2) That the Discharge Certificate, "Under Conditions Other Than Honorable", DD Form 258, provided plaintiff be rescinded.
>
> (3) That plaintiff's demotion from PVT E–2 to PVT E–1, effected on 5 October 1965, be revoked and he be restored to his rightful grade, including any promotion

consideration to the next higher grade, to which he would have been entitled under the promotion criteria then in effect.

(4) That he be furnished an Honorable Discharge Certificate, DD Form 256, from the date of expiration of his term of enlistment.

(5) For such other and further relief as may be appropriate in the premises.

The jurisdiction of this court is limited to the granting of money judgments against the United States. To the extent that plaintiff seeks to have this court address itself to other matters, we must respectfully decline for want of jurisdiction. *United States* v. *King*, 395 U.S. 1 (1969).

As a preliminary matter, defendant contends:

> In cases of this nature, the Court's jurisdiction is limited to the entry of a money judgment. *King* v. *United States*, [sic] 395 U.S. 1 (1969). Plaintiff has no possible claim for money damages. Plaintiff's civilian earnings for the remaining period of his enlistment following his discharge are more than any possible Army compensation * * *. These earnings must be deducted. *Motto* v. *United States*, 175 Ct. Cl. 862 (1966). Moreover, by his own voluntary actions plaintiff diminished his civilian earning capacity * * * and it must therefore be concluded that even if he had not earned more than his Army compensation, recovery would [be] precluded. See *Schwartz* v. *United States*, 149 Ct. Cl. 145, 181 F. Supp. 408 (1960); *Kanarek* v. *United States*, 184 Ct. Cl. 125, 142–144 (1968).
>
> Accordingly, plaintiff has no claim within this Court's jurisdiction. [Brief pp. 3–4.]

The instant case is here on the issue of entitlement only, the parties having agreed that the determination of the amount of recovery, if any, will be reserved for further proceedings. Defendant is correct in his assertion that plaintiff's civilian earnings during the unexpired term of his enlistment may be used in the nature of an offset against any recovery to which plaintiff might be entitled in this case. *Motto* v. *United States*, 175 Ct. Cl. 862, 360 F. 2d 643 (1966). However, even though the defendant has entered some evidence on the record to support its contention that plaintiff's interim civilian earnings are greater than any amount of possible recovery, such evidence is not now properly before the court for con-

sideration. Where separate trials to resolve the issues of entitlement and damages have been agreed upon, such evidence can be considered only in a proceeding to make a determination as to the quantum of recovery. In a damage proceeding in which the defendant's claimed offset is found to be larger than the amount plaintiff is entitled to recover, the plaintiff's petition will be dismissed for failure to show compensable damages. *Conn* v. *United States*, 180 Ct. Cl. 120, 376 F. 2d 878 (1967); *Conn* v. *United States*, 187 Ct. Cl. 319, 407 F. 2d 879 (1969).

Army Regulations 635–89 (dated September 8, 1958, as amended by Change 1, April 14. 1959 and Change 2, January 22, 1960), prescribe procedures for the separation of homosexuals from the Army. Paragraph 2.*b*. thereof reads in pertinent part as follows:

> **2. Policy.**
>
> * * * * *
>
> *b*. The following classes of persons will not be processed under the provisions of these regulations:
>
> (1) Individuals who seek to avoid military service by an unverifiable assertion of homosexuality.

Plaintiff argues that he presented the Army with an "unverifiable assertion of homosexuality" and thus should not have been processed under the terms of AR 635–89. Additionally, he maintains that his commanding officer did not make the thorough and comprehensive inquiry into the facts of the case required by paragraph 4.*b*. of the said regulations which reads as follows:

> **4. Responsibility.**
>
> * * * * *
>
> *b*. A commanding officer receiving information that an individual under his command is a homosexual or has engaged in an act of homosexuality, will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges. Flagging action will be initiated in accordance with AR 600–31. When the report of investigation does not substantiate the allegation of homosexuality or the commission of a homosexual act, the case will be closed and flagging action under AR 600–31 removed. When the

report of investigation substantiates such allegations, the commanding officer will—

(1) Refer the individual for medical evaluation (par. 9).

(2) Upon receipt of the medical evaluation of the individual concerned, and in the absence of a major mental illness, determine under which class the case should be processed by comparing the facts with the definitions of class I, II, and III, and then process the case accordingly.

Conceivably, a situation might arise where a thorough and comprehensive inquiry into an individual's circumstances might reveal no evidence corroborative of his self-admitted homosexuality. The issue would then arise as to whether a psychiatric diagnosis of homosexuality would be sufficient to constitute the subject's assertion of homosexuality "verifiable." However, since it is clear that the Army did not inquire "thoroughly and comprehensively" into plaintiff's case, that set of circumstances is not now before the court.

From the record, it clearly appears that plaintiff was discharged upon the strength of his own statements and a psychiatric evaluation.[1] Had the Army made an independent inquiry into plaintiff's background and military associations,[2] it might likely have developed much of the evidence that is before this court today in support of plaintiff's heterosexuality.

Defendant apparently seeks to have the court invoke the doctrine of estoppel as a complete bar to plaintiff's claim, citing: *Mahoning Inv. Co.* v. *United States*, 78 Ct. Cl. 231, 3 F. Supp. 622 (1933), *cert. denied*, 291 U.S. 675 (1934); *Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 394 F. 2d 900 (1968), and *Henneberger* v. *United States*, 187 Ct. Cl. 265, 407 F. 2d 1340 (1969). Although the Army relied exclusively upon plaintiff's sworn statements and the psychiatric evaluation, it was not entitled to do so under the regulations. To avail itself of the defense of estoppel, defendant must have "reasonably" relied upon the misrepresentation which it claims gives rise to the estoppel. *Birkelund* v. *United*

[1] Since the Army's failure to make the requisite inquiry into the matter is sufficient to permit plaintiff to recover, no finding has been made with regard to the other grounds plaintiff urges for relief.

[2] Plaintiff's immediate superior found out about this matter only when plaintiff's papers had already been processed for discharge.

States, 135 Ct. Cl. 503, 513, 142 F. Supp. 459, 465 (1956); *Sound Ship Building Corp.* v. *United States*, 158 Ct. Cl. 1, 8 (1962); *Pacific Far East Lines*, *supra*, at 194. Since the Army failed to make a thorough and comprehensive inquiry into this matter as required by regulation, the defendant can hardly claim to have "reasonably" relied on plaintiff's misrepresentations, and the defense of estoppel is thus not available. The failure of the service to follow its own regulations entitles plaintiff to recover the unexpired portion of the term of his enlistment at the E–2 rate. *Middleton* v. *United States*, 170 Ct. Cl. 36 (1965); *Service* v. *Dulles*, 354 U.S. 363 (1965). For an extremely interesting discussion of "Homosexuals in the Military," see 37 FORDHAM L. REV. 465 (1969).

FINDINGS OF FACT

1. Plaintiff is a citizen of the United States and a resident of the State of California.

2. Plaintiff was born on December 4, 1942, at Long Branch, New Jersey, and resided in Matawan, New Jersey, until he was 14 years old. His family then moved to Bethel, Connecticut. Bethel remained his residence until 1964.

3. Plaintiff attended Hamilton College, then a small liberal arts men's institution located in upstate New York. He played on the Hamilton varsity football team for 3 years, sang in the college choir and served as an officer of his social fraternity.

4. At Hamilton College, plaintiff had intended to prepare himself for further study in the field of medicine, having expressed interest in psychiatry. Difficulties in introductory courses in biology and mathematics convinced him to abandon his goal. He graduated with a major in English literature.

5. While in his senior year at Hamilton, plaintiff made application to the Peace Corps, and received notice in May 1964 that he had been accepted as a trainee. Following graduation in June of 1964, he reported to Davis, California, for preliminary training. He was selected out of the program in July of that year, due (according to the plaintiff) to his inflexibility and low tolerance for frustration.

6. After severance from the Peace Corps training program, plaintiff decided to remain in California. He obtained a position with a residential building firm in Woodland, California. In his employment with this firm he displayed energy and desire to succeed as a commission salesman and enjoyed corresponding financial success, earning upwards of $1,000 per month.

7. After having worked for the aforementioned firm for only a short time, plaintiff was directed by his draft board to report for his preinduction physical.

8. In the hope of receiving a better assignment as a volunteer than he would have received through the draft, plaintiff enlisted in the Army on January 5, 1965, for a 3-year tour of duty.

9. Plaintiff was sent to Fort Polk, Louisiana, for basic training. Because of low mechanical aptitude scores, plaintiff was discouraged from applying for officers training school. In March 1965, following basic training, plaintiff was transferred to Fort Belvoir, Virginia, for power generator specialist schooling—which assignment did not coincide with plaintiff's desires. On May 5, 1965, the plaintiff was promoted to E–2 grade.

10. In the spring of 1965 plaintiff applied for an assignment with Army Intelligence. He went to Fort Holabird for tests and interviews, and was notified that he was being considered for transfer.

11. On July 14, 1965, upon completion of his training at Fort Belvoir, plaintiff was assigned to a missile battalion at Fort Hancock, New Jersey. His earliest assignment at Fort Hancock was custodial care of the base.

12. Plaintiff was interviewed at Fort Hancock by Sgt. Maj. Melvin H. Bonsall and was chosen to serve under him as a clerk in the battalion orderly room.

13. During his 4 years at Hamilton College, plaintiff had developed a warm friendship with Julian Engleman, the father of one of his college classmates. Plaintiff had often visited the Engleman home in Connecticut during college vacations, and had been counseled on several occasions by Mr. Engleman when personal problems had arisen.

14. Some time prior to August 12, 1965, plaintiff visited the Engleman home in Connecticut and told Mr. Engleman of plaintiff's intention to inform Army authorities that he is a homosexual, in order to be discharged from the service. The plaintiff related to Engleman that he found it impossible to conform to Army life, that he objected to taking orders, and that the entire routine was one to which he felt he could not adjust.

15. Perceiving that plaintiff was in an agitated state, Mr. Engleman counseled him not to pursue his contemplated course of action, pointing out the serious consequences of such a stain on his record.

16. Through his work in the orderly room, plaintiff became acquainted with one of the chaplains (Maj. Reginald J. Huebner). Some time prior to August 12, 1965, plaintiff talked with Maj. Huebner while walking across a parking lot on the base and told the chaplain that he feared that homosexual inclinations he had might get him into difficulty with the men in his barracks.

17. Upon being informed of plaintiff's homosexual inclinations, the chaplain made an appointment for him to discuss the matter with an officer of the Mental Hygiene Consultation Service at Fort Monmouth, New Jersey.

18. On August 12, 1965, plaintiff was examined for 45 minutes at the Fort Monmouth Mental Hygiene Consultation facility by Lt. Arthur J. Rudy. Rudy commenced his active duty in July of 1962. He served from August 5, 1964, as a psychological assistant (military occupational specialty code—MOSC—2239), stationed at Patterson Army Hospital, Fort Monmouth, New Jersey. He received his doctor of philosophy degree from Columbia University on June 1, 1965 (while in service), and commenced duties as a clinical psychologist (MOSC 2232) at Patterson Army Hospital on July 27, 1965.

19. Army Regulations AR 611–101 (dated June 2, 1960, and entitled "Personnel Selection and Classification Manual of Commissioned Officer Military Occupational Specialties") define "psychological assistant" as follows:

MOS Code 2239

PSYCHOLOGICAL ASSISTANT

Summary: Performs selected aspects of psychological work under direction of psychologist or clinical psychologist, or when not so supervised, performs duties requiring limited professional training and experience.

Duties: Administers, scores, and interprets standard psychological tests and applies standard psychological techniques, under direction of psychologist or clinical psychologist, as part of examination of individuals. Assists in research concerned with objective techniques for measuring human capacities, aptitudes, abilities, attitudes, and psychophysiological reactions. Conducts aspects of remedial therapy in selected cases under supervision of clinical psychologist or psychiatrist. Counsels individuals on training and occupational problems. Under supervision, collects, develops, applies, and interprets scientific data for purpose of investigating psychological phenomena.

* * * * *

20. The same regulations define "clinical psychologist" as follows:

MOS Code 2232

CLINICAL PSYCHOLOGIST

Summary: As member of neuropsychiatric team, applies psychological knowledge and techniques in dealing with problems of psychological nature in medical setting.

Duties: As member of neuropsychiatric team, prepares interpretive reports of psychological examinations and administers projective techniques in clinical evaluation of individuals to reveal special abilities, disabilities, personality assets, potential and functional intellectual capacity and level, and nature and degree of personality disorder or defect, and to indicate dynamics of behavior. Instructs clinical psychology interns and students in proper use of psychological techniques and in preparation of clinical evaluative reports. Under psychiatric supervision, conducts various forms of remedial therapy with particular emphasis upon patients who have aphasic difficulties, speech dysfunctions, auditory or visual defects, faulty habit patterns or psychomotor defects. Counsels individuals on training or vocational problems and on changes in military occupational specialty neces-

sitated by neurological or psychiatric disorder. Conducts therapy under psychiatric supervision.

Performs research in psychological field with current and proposed methods of psychodiagnosis and therapy, dynamics of normal and abnormal behavior, and problems of personality development and adaptability. Assists psychiatrist in program of mental hygiene through orientation of military personnel in personal adjustment problems. Recommends revision or adoption of policies to improve use of clinical psychology personnel. Serves as liaison officer in clinical psychology between other military and civilian agencies and unit to which assigned. Participants in neuropsychiatric staff conferences as specialist in psychological principles and methodology. Supervises, or assists chief psychologist in supervising, staff psychological assistants and clinical psychology technicians.

* * * * *

21. On August 19, 1965, plaintiff was again examined (for 45 minutes to an hour) by Lt. Rudy. Capt. John S. Weltner, M.D. (chief of the Mental Hygiene Consultation Service, Fort Monmouth, New Jersey)[1] was also present.

22. Capt. Weltner commenced his active duty service in June 1964 as a psychiatrist (MOSC 3129). Weltner received his medical training at Harvard University. Prior to entering the service, he had treated patients since 1961 as a resident in training at the Massachusetts Mental Health Center and at the James Jackson Putnam Children's Center.

23. The aforesaid Army Regulations AR 611-101 define "psychiatrist" as follows:

MOS Code 3129

PSYCHIATRIST

Summary: Examines, diagnoses, and treats or prescribes course of treatment for personnel suffering from mental disorders and diseases.

Duties: Examines personnel, makes diagnosis of disease or disorder, and prescribes course of treatment. Acts as consultant in this specialty to other medical services in hospitals or other installations and to courts-martial and various Army boards. Instructs and supervises nurses, assistants, and neuropsychiatric technicians

[1] In August 1965, the Mental Hygiene Consultation Service at Fort Monmouth consisted of Capt. Weltner, Lt. Rudy, a psychiatric social worker (an officer), from three to six enlisted men and a secretary.

in care, treatment, and management of patients. Plans, directs, and supervises mental hygiene and therapy program and advises on health and morale of command. Conducts psychiatric activities in field units to insure mental fitness of troops. Records medical data or case history on prescribed Army Medical Service forms. Reviews and studies medical history and progress of patients.

* * * * *

24. The report of psychiatric evaluation dated August 20, 1965, prepared in regard to plaintiff, reads in pertinent part as follows:

1. WEIR, Donald S. Jr., PVT. RA 19 824 015, HQS BTRY, 3/51, Ft. Hancock, N.J.

* * * * *

has been examined and evaluated at the Mental Hygiene Consultation Service, Fort Monmouth, New Jersey on 12 & 19 Aug 1965.

2. Psychiatric evaluation indicates that:

(a) The diagnosis in this case is: Sexual Deviation, homosexuality (3206).

(b) This patient has no physical or mental disability sufficient to warrant separation under provisions of AR 635–40 A & B.

(c) This patient was and is mentally responsible both to distinguish right from wrong and to adhere to the right, and has the mental capacity to understand and participate in Board Proceedings.

3. Conclusions: Pvt. Weir was referred to MHCS by Chaplain Heubner. Pvt. Weir had approached the Chaplain because he was fearful that his homosexual inclinations would get him into difficulty with men in his barracks. During the course of his psychiatric evaluation, Pvt. Weir indicated that his homosexual activity began when he was nine years old. He suggested that he had several homosexual experiences when he was in high school, even more frequent homosexual contacts when he was in college. After college, this 22 yr. old E–2, spent two years in California working as a Real Estate salesman. Again during this period of time, he was involved in several homosexual affairs. Since entering the service, Pvt. Weir indicates that he has had four homosexual contacts—all of these being with civilians who lived in the nearby community. He notes that all his homosexual

contacts have been typified by his tendency toward "promiscuity", that is, he rarely has had more than a single contact with a homosexual partner. Dynamically it appears that his homosexuality is related to the fact that Pvt. Weir has longed for but never had a stable family situation with a father whom he could both love and respect. Although his parents were legally divorced when he was in college, he indicates that father was always in and out of the house—separated at frequent intervals from the family—and not particularly interested in a stable marital or parental relationship. He tears easily when he talks about his mother and sister and the deprivation that they, along with himself, have suffered because of his father's neglect. He has attempted to compensate for father's lack of attention by striving at one level for power—he describes himself as a "super-rocket" who was capable of earning $25,000 per year when he left college and is capable of even greater things in politics or finance. Yet, he questions whether he is really the "super-rocket" that others think he is—he suggests that he feels like "half a rocket"—"empty inside".

At the present time, Pvt. Weir is greatly concerned because he doesn't know just who he is. He sees himself as fluctuating between the "straight" (non-homosexual) world and the "gay" (homosexual) world. Again, he is torn between his drive for the realization of his ambition for power and his feeling that he would like to develop a stable family situation—he sees these last as mutually exclusive. Finally, Pvt. Weir, because of his difficulties with his father, has found himself quite distressed in the military—especially when he has to take orders from people just a little older than he is—and in this regard, finds himself very angry a good part of the time. He feels that when his anger overwhelms him, he turns toward homosexuality.

In addition to his homosexual difficulties, Pvt. Weir also reflects long-term characterological problems—passive-aggressiveness, and strong dependency concerns. Mental status examination reveals a bright, 22 yr. old, whose verbalizations, while most often, quite appropriate and goal directed, are sometimes marked by inappropriate word usage and mild loosening of associations. Although mildly depressed, affect is appropriate. It is felt that Pvt. Weir is responsible for his actions.

It is recommended that Pvt. Weir be eliminated from the service under provisions of AR 635–89.

(s) J. Weltner
JOHN S. WELTNER,
Captain, MC, Chief, MHCS.
(s) Arthur J. Rudy
ARTHUR J. RUDY,
1/Lt, MSC, Clinical Psychologist.

25. A psychiatric evaluation generally consists of the psychiatrist interviewing the patient from one to three times to obtain information concerning the patient's background and concerns. This information then provides the basis upon which to formulate a psychiatric diagnosis.

26. Unless some physical health problem becomes evident to the psychiatrist during the evaluation session, it was Dr. Weltner's opinion that it would be unusual to refer the subject to another medical specialist. Plaintiff was not so referred. In the case of alleged homosexuality, it was Dr. Weltner's opinion that no medical inquiry beyond that of a psychiatric evaluation would have had relevance. Further, it was his opinion that in determining homosexuality, there were no psychological testing procedures which would have been superior to the direct questioning procedures utilized in plaintiff's case.

27. Dr. Weltner testified that in smaller clinics (like the one at Fort Monmouth) a clincal psychologist is expected to treat patients, and to perform functions similar to those of a psychiatrist.

28. Dr. Weltner testified that Lt. Rudy [2] had prepared the psychiatric evaluation of plaintiff. It was customary procedure for Rudy to write up a patient's report of psychiatric evaluation, which would then be reviewed by Weltner in his capacity as chief of the Mental Hygiene Consultation Service at Fort Monmouth.

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[2] In Dr. Weltner's opinion, Lt. Rudy was an outstanding clinician, and upon the recommendation of Dr. Weltner, Rudy received the Army Commendation Medal for his services at the Mental Hygiene Consultation Service at Fort Monmouth.

29. In addition to discussing Lt. Rudy's new patients with him, Capt. Weltner generally spent an hour to an hour and a half per week with him, going over Rudy's cases or some particularly difficult diagnosis problem.

30. In a letter to plaintiff's counsel dated June 16, 1967, Arthur J. Rudy (no longer a member of the armed services) stated:

* * * * *

> Rereading the report that I and Capt. Weltner undersigned [REPORT OF PSYCHIATRIC EVALUATION] brought back only the most vague of recollections re: Pvt. Weir. * * * In fact, I cannot recall anything of significance that could be added to the report nor anything that I might have learned at the time that I didn't include in the report.

* * * * *

31. After rereading the report of psychiatric evaluation of plaintiff, Dr. Weltner had no substantial independent recollection of the second interview which formed a part of the basis for the subject report. He could not recall what part he had taken in the subject interview. He maintained it was his custom to propound questions to the patient, and that he and Rudy had probably discussed the case after the second session. His primary recollection was that the interview had occurred.

32. Dr. Weltner could not recall the precise number of homosexual cases which came to his attention in his 2-year tour of duty as chief of the Mental Hygiene Consultation Service at Fort Monmouth. However, he was certain that the number was between 3 and 20, including the instant case.

33. Dr. Weltner could not recall whether or not he knew in August of 1965 the extent to which Lt. Rudy was familiar with and experienced in dealing with homosexual cases. Weltner stated that in the period in which he had supervised Rudy's work, he thought Rudy had investigated between 3 and 20 such cases, including that of the plaintiff.

34. Dr. Weltner testified that while he was serving at Fort Monmouth, personnel in the Mental Hygiene Consultation Service were aware of the possibility that some men might falsely claim that they were homosexuals in order to be relieved of their military obligation.

35. Subsequent to his Army service, Dr. Weltner has had experience with individuals who have claimed to be homosexuals in order to avoid military service.

36. Relying solely upon the information contained in the subject report, Dr. Weltner's opinion is that plaintiff was telling the truth during the second interview. Weltner based his conclusion on the grounds that:

(a) In his opinion, plaintiff's personal history was consistent with his claim of homosexuality.

(b) In Weltner's opinion, there are two items noted in the subject report which were impossible to simulate.

37. The two items which Weltner identified were inappropriate word usage and loosening of associations. The section of the aforementioned report which notes these phenomena reads as follows:

> In addition to his homosexual difficulties, Pvt. Weir also reflects long-term characterological problems—passive-aggressiveness, and strong dependency concerns. Mental status examination reveals a bright, 22 yr. old, whose verbalizations, while most often, quite appropriate and goal directed, are sometimes marked by inappropriate word usage and mild loosening of associations. Although mildly depressed, affect is appropriate. It is felt that Pvt. Weir is responsible for his actions.

38. It seems apparent from Dr. Weltner's testimony, his correspondence with plaintiff's attorney and the above-quoted section of plaintiff's psychiatric evaluation that "inappropriate word usage" and "loosening of associations" are, in Weltner's opinion, symptomatic of considerable emotional stress, rather than of homosexual tendencies.

39. Dr. Weltner admitted that he did not know how successful he had been in the past in determining the veracity of his patients.[3] He further acknowledged that he would not be surprised to learn that on occasion he had been misled, although he doubted that it had happened very often. He

[3] In interviewing a responsible adult, a psychiatrist starts with the assumption that the subject is being truthful, unless put on notice by the subject's reporting symptoms which are not consistent with his account of his personal history. It is extremely unusual for a psychiatrist to consult a third person to determine whether a patient's statements are truthful. Generally, outside sources are not consulted unless the subject is unable to form a picture of himself, as in the case of a young child.

recognized the possibility that he could have misdiagnosed plaintiff. As he put it: "It is a very difficult kind of decision to make, but we have to use our judgment."

40. Prior to his discharge from the Army, plaintiff visited his mother in a New York hotel room where she was staying prior to departure for California. Mrs. Weir described her son's condition at the time as being one of emotional distress. It was difficult for her to follow his incoherent sentences. Plaintiff informed her that he had fabricated a story that he was a homosexual in order to be discharged from the Army, and that his story had been believed by the Army authorities. Mrs. Weir remonstrated with plaintiff stating that such a course of conduct would have a profound effect on his future and urging that it would be better to tell the Army that he had lied and to accept the consequences.

41. Army Regulations No. 635–89 (dealing with personnel separations of homosexuals), dated September 8, 1958,[4] state in pertinent part as follows:

SECTION I

GENERAL

1. **Purpose.** These regulations prescribe the authority, criteria, and procedures for the disposition of military personnel who are homosexuals or alleged homosexuals.

2. **Policy.** *a.* Homosexual personnel irrespective of sex will not be permitted to serve in the Army in any capacity, and prompt separation of homosexuals, as defined in these regulations, is mandatory. Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society.

b. The following classes of persons will not be processed under the provisions of these regulations:

(1) Individuals who seek to avoid military service by an unverifiable assertion of homosexuality.

(2) Those individuals who solely as a result of immaturity, curiosity, or intoxication have been involved in homosexual acts. Such individuals who are not eliminated

[4] These regulations were amended by Change 1, April 14, 1959 and Change 2, January 22, 1960.

from the service by sentence of court-martial and who are considered inept, unsuitable, or undesirable by reason of immaturity, alcoholism, or other character and behavior disorders may be eliminated from the service under other applicable regulations.

(3) In those rare cases in which homosexual acts are symptomatic of an incapacitating mental illness such as psychosis, medical treatment will be provided and separation from the service by reason of the primary medical condition will be made, if indicated.

* * * * *

3. Definitions. For the purpose of these regulations the following definitions apply:

a. Homosexual. An individual, regardless of sex, who demonstrates by behavior a preference for sexual activity with persons of the same sex.

b. Homosexual act. Bodily contact between persons of the same sex actively undertaken or passively permitted with the intent of obtaining sexual gratification, or any proposal, solicitation, or attempt to perform such an act.

c. Class I. Class I consists of those cases which involve an invasion of the rights of another person, as when the homosexual act is accompanied by assault or coercion, or where the person involved does not willingly cooperate in or consent to the homosexual act, or, if the act is cooperated in or consented to, where the cooperation or consent was obtained by fraud. Class I also includes cases which involve a homosexual act with a child under the age of 16 years, without regard to whether the child cooperated in or consented to such an act.

d. Class II. Class II consists of those cases in which homosexual military personnel have engaged in one or more homosexual acts not within the purview of class I during active military service. Class II also includes all cases falling within class I in which it is determined not to prefer charges, or, if charges are preferred, not to refer them to a court-martial for trial, or such cases where trial is held but does not result in a punitive discharge. No distinction is made in the administrative handling of these cases involving homosexual acts because of the active or passive nature of the conduct of the participants.

e. Class III. Class III consists of those cases in which the homosexual individual involved has not engaged in a homosexual act during active military service, and those cases otherwise within the purview of these regulations but not falling within the purview of classes I or II.

* * * * *

42. The above regulations further provide:

SECTION II

PROCEDURES

4. Responsibility. * * *

b. A commanding officer receiving information that an individual under his command is a homosexual or has engaged in an act of homosexuality, will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges. Flagging action will be initiated in accordance with AR 600–31. When the report of investigation does not substantiate the allegation of homosexuality or the commission of a homosexual act, the case will be closed and flagging action under AR 600–31 removed. When the report of investigation substantiates such allegations, the commanding officer will—

(1) Refer the individual for medical evaluation (par. 9).

(2) Upon receipt of the medical evaluation of the individual concerned, and in the absence of a major mental illness, determine under which class the case should be processed by comparing the facts with the definitions of class I, II, and III, and then process the case accordingly.

* * * * *

9. Documentation of cases. It is essential that all facts indicating homosexual tendencies or acts be recorded properly, and that signed statements of all witnesses be obtained (see UCMJ, Art. 31). In all cases, including those in which the immediate commanding officer requests board action, the report will include the statement of the individual's date of birth; the amount of active service of the individual concerned; the date and period of the individual's current period of service; statements of witnesses; a copy of general court-martial charges and investigations under Article 32, when applicable; the resignation letter of the individual concerned or a signed statement by the enlisted person regarding acceptance of discharge; a detailed signed statement from the individual concerned (in class III cases) relative to his tendencies and any past homosexual actions, or his statement to the effect that he does not desire to make a statement; and the commanding officer's detailed comments and recommendations. Also included with the

file will be a medical evaluation, including psychiatric study of the individual concerned. An adequate medical evaluation will include as a minimum:

a. Personal history, including, if any, a detailed account of development of homosexuality.

b. Report of mental status examination.

c. Psychiatric diagnosis, if any.

d. Opinion regarding the existence of homosexuality. (No recommendations will be made concerning the classes of homosexual cases defined in par. 3.)

e. Statement as to mental responsibility.

* * * * *

g. Recommendation regarding medical disposition of the case, if any.

h. Statement as to whether there are any medical contraindications for administrative disposition.

* * * * *

i. A copy of the medical evaluation to include the psychiatric study will be filed with the individual's health record.

* * * * *

43. On August 24, 1965, plaintiff executed a sworn statement, reading in pertinent part, as follows:

I, Donald S. Weir, Jr., RA19824015, have been counseled and advised of the basis of action recommended. I have a copy of the Commanding Officer's report and copies of statements submitted to support the recommendations for elimination and the names of prospective witnesses to appear or to submit statements that will be used against me.

I have been offered counsel and I have declined to accept this offer.

I hereby waive hearing before a board of officers. I understand that if he, [sic] convening authorities direct a discharge, I will not be given another opportunity to appear before a board of officers before being discharged.

I would like to make the following statement.

I testify that I have a problem with homosexual tendencies which predates my coming on active duty with the US Army. These tendencies have trailed in my background since I was about nine (9) years old. Sporadically, these homosexual feelings supplant what society calls normal heterosexual activities. I have not engaged in these activities with military personnel at either this station or at my previous ones, Fort Belvoir and Fort Polk, respectively. Generally, these engagements were

with casual acquaintances whom I have met while on either leave or pass. Since these tendencies could occur in the future, I believe my mission for the US Army would be impaired.

44. On August 31, 1965, plaintiff executed a further statement, waiving a hearing before a board of officers, as follows:

> I hereby waive hearing before a board of officers under AR 635–89 and accept discharge for the good of the service. I understand that my separation from the Army may be effected by a discharge under conditions other than honorable; that I may be deprived of many rights and benefits as a veteran under both Federal and State law; and, that I may expect to encounter substantial prejudice in civilian life in situations where the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

45. The plaintiff's battery commander, on August 23, 1965, sent a letter to the Commanding Officer, 3rd Missile Battalion, 51st Artillery, Fort Hancock, New Jersey, which reads as follows:

> 1. UP AR 635–89 recommend PVT E2 Donald S. Weir Jr., RA 19824015, a member of this unit be discharged from the service.
>
> 2. The following personnel [sic] data is submitted:
>
> a. Donald S. Weir Jr., PVT E–2 RA 19824015, 22 years old, enlisted 5 January 1965 for a period of three (3) years with no prior service.
>
> 3. This recommendation is based on the following information:
>
> a. PVT E2 Weir admits to homosexual interest and has expressed a continued desire to participate in homosexual activities. (See Report of Examination and Evaluation, inclosure 1, and PVT Weir's statement inclosure 2.)
>
> b. AFQT Score: 62
>
> c. Aptitude Area Scores: EL: 121, GM: 83, MM: 109, CL: 132, GT: 130, RC: 119, IN: 125, and AE: 113.
>
> d. CONDUCT: Unsatisfactory. EFFICIENCY: Excellent.

By first endorsement the addressee sent the above-quoted letter to higher authority, the Commanding Officer, 19th Artillery Group (AD), Highlands Air Force Station, Highlands, New Jersey, in words which read:

1. Recommend that Private Weir be discharged from the service UP of AR 635–89.

2. EM has been counseled and advised of the basis for the action recommended UP AR 635–89 and has been afforded the opportunity to be represented by counsel, an opportunity which he declines.

3. EM has submitted written statements which are attached as inclosures 2 and 3.

By further endorsements the letter reached the Commanding General, Headquarters, 1st Region, United States Army Air Defense Command, Fort Totten, Flushing, Long Island, New York, who placed the following endorsement thereon, through channels to the 3rd Missile Battalion at Fort Hancock, New Jersey:

1. Approved.

2. Private Donald S. Weir, Jr., RA 19 824 015, will be discharged from the service because of Homosexuality, as a Class II Homosexual, as outlined in paragraph 3d, AR 635–89.

3. Providing enlisted man is not already in the lowest enlisted grade, he will be immediately reduced thereto, in accordance with para 13, AR 635–89 and para 31e, AR 624–200.

4. DD Form 258A (Undesirable Discharge) will be furnished. The reason and authority for separation to be entered in item 11c, DD Form 214, will be "AR 635–89, SPN 257." To preclude reentry into the U.S. Army, "Para 10, AR 601–210 applies", will be entered in item 32, DD Form 214. Reenlistment Code RE–4 will be entered above item 1 on DD Form 214.

46. Following his discharge from the Army, plaintiff returned to California. Although he had been advised by Lt. Rudy, Capt. Weltner and his mother to seek professional psychiatric advice, plaintiff did not follow such a course of action.

47. In California, plaintiff obtained a sales position with a division of the same residential building firm for which he had worked prior to his enlistment in the Army. It is not clear why he left. Later plaintiff obtained various positions in retail sales and as a tax assessor. Some time prior to May 8, 1968, he applied for a position as a sales representative with the Xerox Corporation. In his application for this position he falsified his service record. After a number of interviews

he was hired, only to be dismissed shortly thereafter when the results of the company's check of the plaintiff's military record proved unfavorable.

48. On May 8, 1968, plaintiff (by counsel) filed an Application for Review of Discharge or Separation from the Armed Forces of the United States, requesting that the Army Discharge Review Board upgrade his undesirable discharge.

49. A hearing was held on plaintiff's application at which time testimony was taken from Tyrone Brown, a college associate of plaintiff.

50. In addition to the testimony of Tyrone Brown, plaintiff presented to the Board a number of affidavits and letters from friends, relatives, associates, educators and employers.

51. On September 11, 1968, the Army Discharge Review Board denied plaintiff's request that his discharge be upgraded, finding that "THE APPLICANT WAS PROPERLY DISCHARGED."

52. On October 3, 1968, plaintiff petitioned the Army Board for Correction of Military Records, requesting that his "[d]emotion to Pvt. E–1, and administrative discharge UNDER CONDITIONS OTHER THAN HONORABLE, DD Form 258, be corrected to reflect actual character of service." Plaintiff presented to the Board the record of the proceedings before the Army Discharge Review Board and requested a hearing before the Board.

53. On May 28, 1969, plaintiff's application was denied by the Army Board for Correction of Military Records, without a hearing as had been requested by the plaintiff.

Recommended Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. The amount of recovery is reserved for further proceedings under Rule 131(c).

U.S. GOVERNMENT PRINTING OFFICE: 1972

APPENDIX D

Supreme Court of the United States

No. A-139 ~~October Term, 19~~

DONALD S. WEIR,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 9, 1973.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this First
day of July, 1973

APPENDIX E

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

STATUTES, RULES AND REGULATIONS INVOLVED

10 U.S.C. 3811(b)(1), pertaining to Army enlisted members, provides:

"(b) No enlisted member of the Army may be discharged before his term of service expires, except –

(1) as prescribed by the Secretary of the Army;"

Rule 52. F.R.C.P. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of

fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 147(b), Rules of the United States Court of Claims, (28 U.S.C., Rules United States Court of Claims), provides as follows:

> (b) Commissioner's Report: The court may adopt the commissioner's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the commissioner to receive further evidence, or refer the case back to him with instructions. *Due regard shall be given to the circumstance that the commissioner had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the commissioner shall be presumed to be correct.*

Army Regulation No. 635-89, 8 September 1958, as amended by Change 1, April 14, 1959, and Change 2, January 22, 1960.

2. Policy.

* * * * *

b. The following classes of persons will not be processed under the provisions of these regulations:

(1) Individuals who seek to avoid military service by an unverifiable assertion of homosexuality.

* * * * *

4. Responsibility.

* * * * *

b. A commanding officer receiving information that an individual under his command is a homosexual or has engaged in an act of homosexuality, will inquire thoroughly and comprehensively into the matter and ascertain all the facts in the case, bearing in mind the peculiar susceptibility of such cases to possible malicious charges. Flagging action will be initiated in accordance with AR 600-31. When the report of investigation does not substantiate the allegation of homosexuality or the commission of a homosexual act, the case will be closed and flagging action under AR 600-31 removed. When the report of investigation substantiates such allegations, the commanding officer will–

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STIGMA ON 500,000 MEN

Rethinking the 'Bad Discharg

By Raymond P. Boulanger

Bad discharges from the military are one of the many bitter legacies of the Vietnam war. As it is, Vietnam era veterans with honorable discharges must contend with high unemployment rates, inadequate veterans benefits, and public indifference to their sacrifices and needs. The veteran with a bad administrative discharge, either a general or the even worse undesirable discharge, suffers further from the potentially disabling stigma associated with such a discharge.

It is ironic that public attention has focused on proposals of amnesty for a handful of draft evaders (most of whom could adjust easily to civilian life because of their middle-class backgrounds) while ignoring the one-half million former soldiers from the Vietnam era, often black, uneducated, or poor, many of whom because of a bad administrative discharge may find civilian life filled with bitter frustrations and hardships.

(The administrative discharge is a category separate from punitive—"bad conduct" or "dishonorable" discharges. This article does not address itself to punitive discharges.)

Since 1961, more than 200,000 individuals have received an undesirable discharge from the military services—either in lieu of court-martial or as a result of administrative proceedings for "unfitness," which encompasses such things as drug abuse and an established pattern of shirking duty. A disproportionate number of these discharges was issued to blacks, the undeducated, or the poor. For example, in fiscal year 1971, blacks received undesirable discharges at twice the rate of whites. In the last decade, 300,000 more individuals received a general discharge, granted usually for "unsuitability," a term of art covering such things as character and behavior disorders.

In addition to a discharge certificate, all veterans receive a Report of Discharge (DD Form 214) which carries a coded number SPN) indicating the reason for the individual's discharge. Some of these — for example, SPN 384 which indicates drug abuse as the basis for discharge — can have disastrous consequences to the future opportunities of the veteran.

A study by Mag. Bradley K. Jones recently published in the *Military Law Review* confirmed that bad administrative discharges adversely affect employment opportunities. He concluded on the basis of the results of a survey of employers, educators, and professional licensing authorities that "less than honorable discharge obviously hampered an ex-serviceman's employment or acceptance prospects." In fact 20 percent of all surveyed employers automatically disqualify any job applicant with an undesirable discharge. Many others treat the characterization of service as the most important factor in determining whether the individual is employable, especially when he is being evaluated for a position where moral character may be important — law enforcement, for example, or where a security clearance is needed.

This is unfortunate. The often extraordinary demands of the military, especially in a combat situation, are not the same as those experienced on an assembly line or in an office, and the individual's inability to cope with military service, especially when he is only 18 or 19 years old, is not a valid predictor of his future job performance even in a sensitive position.

There is also something quite unfair about this entire characterization system in that those who escape military service, generally the more affluent members of society, are not subjected to the possible consequences of a bad administrative discharge. And if they do flunk out of Yale or are fired by Ford, they are not branded for life as "undesirables."

If rebuffed in obtaining a job, the veteran with an undesirable discharge may seek to better himself by applying for GI educational or training benefits. Again, he is likely to be rebuffed. Although the Veterans Administration adjudicates questionable cases to determine whether the service satisfies the requirements of the VA, the usual result is to deny those with undesirable (but not general) discharges VA benefits, a substantial economic loss for many individuals.

Most of the criticism of the military's discharge system has been directed toward the due process protections afforded the individual subject to administrative separation. For example, Senator Sam Ervin (D.-N.C.) has introduced bills in the Congress which would impose additional procedural safeguards on the administrative separation of servicemen under other than honorable conditions. This approach, however well-intentioned, is largely misguided. Except for certain rules of evidence regarding the introduction of hearsay and illegally obtained evidence and certain problems with compelling the attendance of witnesses, the current procedures for awarding undesirable and general discharges afford the individual a substantial measure of due process, including the right to legal counsel and a board hearing. Layering still more due process on the system is not really going to help.

Many individuals waive their right to contest their separation. Although the serviceman is advised by his legal counsel on the consequences of an undesirable or general discharge, it is too much to expect an 18 or 19 year-old to understand or appreciate what this would mean to him in personal terms.

Many of the servicemen may also have been misled by "barracks lawyers" into thinking that their bad discharges ("bad paper") could be automatically recharacterized after a short waiting period. In truth, it is extremely difficult to obtain a recharacterized discharge from the two review boards established by Congress for this purpose. For many serviceman even if they had some understanding of the consequences of an undesirable or general discharge and knew it could not be changed, they would probably not resist it. For many it is an easy way to end hassles with the military. Even if a man has a good case in his defense, he often wants "out" regardless of the nature of the discharge.

In any event, the result in most cases is foreordained. The officers ruling on these

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Finally, many servicemen charge a court-martial offense — often AW drug charges — request and are g an administrative discharge, usua undesirable discharge, in lieu of martial. In the process, the soldier a possible period of confinement a what he wants most of all, out of th ice. He may later regret this decisio cially if he is black, uneducated, or v any valuable skills.

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THE SUNDAY STAR and DAILY NEWS
Washington, D. C., July 8, 1973 B-3

STIGMA ON 500,000 MEN

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Most of the criticism of the military's discharge system has been directed toward the due process protections afforded the individual subject to administrative separation. For example, Senator Sam Ervin (D.-N.C.) has introduced bills in the Congress which would impose additional procedural safeguards on the administrative separation of servicemen under other than honorable conditions. This approach, however well-intentioned, is largely misguided. Except for certain rules of evidence regarding the introduction of hearsay and illegally obtained evidence and certain problems with compelling the attendance of witnesses, the current procedures for awarding undesirable and general discharges afford the individual a substantial measure of due process, including the right to legal counsel and a board hearing. Layering still more due process on the system is not really going to help.

Many individuals waive their right to contest their separation. Although the serviceman is advised by his legal counsel on the consequences of an undesirable or general discharge, it is too much to expect an 18 or 19 year-old to understand or appreciate what this would mean to him in personal terms.

Many of the servicemen may also have been misled by "barracks lawyers" into thinking that their bad discharges ("bad paper") could be automatically recharacterized after a short waiting period. In truth, it is extremely difficult to obtain a recharacterized discharge from the two review boards established by Congress for this purpose. For many serviceman even if they had some understanding of the consequences of an undesirable or general discharge and knew it could not be changed, they would probably not resist it. For many it is an easy way to end hassles with the military. Even if a man has a good case in his defense, he often wants "out" regardless of the nature of the discharge.

In any event, the result in most cases is foreordained. The officers ruling on these matters reflect an understandable bias in favor of protecting the powers of the commander. And even if the criteria for administratively discharging individuals were severely restricted (as some should be because of their overbreadth and vagueness) or more due process were afforded the individual, there would still be sufficient justification to separate many individuals who for one reason or another failed to observe the expected standards of discipline and order.

"We ought to end altogether the hoary and sanctified practice of characterizing the service of military members; instead, we should issue only certificates of service, uncoded and uncharacterized."

Finally, many servicemen charged with a court-martial offense — often AWOL or drug charges — request and are granted an administrative discharge, usually an undesirable discharge, in lieu of court-martial. In the process, the soldier avoids a possible period of confinement and gets what he wants most of all, out of the service. He may later regret this decision, especially if he is black, uneducated, or without any valuable skills.

As suggested by the Black Congressional Caucus and certain members of the Defense Department's Task Force on the Administration of Military Justice in the Armed Forces, we ought to end altogether the hoary and sanctified practice of characterizing the service of military members; instead, we should issue only certificates of service, uncoded and uncharacterized. We ought also to recharacterize or at least decharacterize all previous bad discharges.

Aside from the fact that the honorable discharge has been granted to millions of veterans and has secured a vocal constituency, there is little reason to retain the present characterization system.

The present system provides little, if any, incentive for good conduct on the part of the serviceman. Many of the "bad performers" are so immature and troubled psychologically that they are totally oblivious to the consequences of the discharge they recieve.

More importantly, there are other deterrents, such as Article 15 non-judicial punishment, which are more effective. The present system also cannot really be justified by the way it dispenses punishments and rewards. The punishment it exacts is often excessive; it may foreclose future job and educational opportunities to the detriment of not only the individual but also society in general. In any case, it is not really necessary to "reward" anyone with an honorable discharge, especially since military service has been traditionally viewed as an obligatory part of citizenship.

A new system might even prove beneficial to the military services. They would still be able to eliminate individuals for cause, but they would be relieved of the onerous task of characterizing the individual's service.

Hopefully, Congress and the Executive Branch will have the compassion and common sense to declare an amnesty on bad administrative discharges. After all, it is only a matter of time before some form of amnesty is granted to draft evaders and deserters. Can we be any less charitable to those who encountered difficulties in their service to their country and received bad administrative discharges?

Raymond P. Boulanger, a lawyer, is completing a tour of duty with the Office of the General Counsel, Department of the Army. The views expressed are those of Capt. Boulanger, not those of the Army.

SUPREME COURT, U. S.
FILED
OCT 30 1973
MICHAEL RODAK, JR., CLERK

No. 73-462

In the Supreme Court of the United States

OCTOBER TERM, 1973

DONALD S. WEIR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

that petitioner was estopped from asserting procedural error (Pet. App. 17-18).

The Court of Claims decision dismissing petitioner's suit is correct and further review is unwarranted.

1. The Court of Claims correctly concluded that petitioner's sworn admission of homosexuality, confirmed by a psychiatric evaluation, fully satisfied the requirements of the Army regulations that homosexuality must be verified before an individual can be discharged from the Army on that ground (Pet. App. 16-17). As the court noted, it would have been unreasonable to interpret the regulation "to require the Army to conduct an investigation of plaintiff's military associates or prior college and business associates especially where there was absolutely no indication that plaintiff was lying * * *" (Pet. App. 16-17). Moreover, longstanding agency interpretation confirms that a sworn admission of homosexuality plus psychiatric confirmation is sufficient for military discharge (Pet. App. 16). An agency's established interpretation of its own regulation is entitled to considerable weight.[1] See *Thorpe* v. *Housing Authority*, 393 U.S. 268; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410.

2. The Court of Claims' alternative holding is also correct. As the court stated: "There is no doubt in the instant case that the government took a po-

---

[1] Moreover, the purpose of the regulation appears to be to prevent unfounded denunciations and defamatory charges by third parties, and to protect the Army against avoidance of military service by false confessions (see Pet. App. 16, 18). An inculpatory admission by a fully competent adult does not fall within either rationale.

sition detrimental to itself when it relied upon the 1965 statements of the plaintiff and granted a premature discharge from the Army to the man who had been trained at government expense" (Pet. App. 17). Therefore, the court correctly applied settled principles of equitable estoppel to prevent petitioner "from profiting from his earlier fabrications" (Pet. App. 18). See *Henneberger* v. *United States,* 187 Ct. Cl. 265, 407 F. 2d 1340; *Mahoning Investment Co.* v. *United States,* 78 Ct. Cl. 231, 3 F. Supp. 622, certiorari denied, 291 U.S. 675.

Contrary to petitioner's contention (Pet. 6-7), the Court of Claims' reversal of the Trial Commissioner's decision did not violate due process. Rule 147(b) of the Rules of the United States Court of Claims does not contain the same language, and need not be interpreted to establish the same standard of review, as Rule 52(a) of the Federal Rules of Civil Procedure, in keeping with differences between District Judges and Court of Claims Commissioners. In any event, a reviewing court is not limited to the clearly erroneous standard when reviewing the legal conclusions of the trier of the fact. *Shultz* v. *First Victoria National Bank,* 420 F. 2d 648 (C.A. 5); *Hebah* v. *United States,* 197 Ct. Cl. 729, 456 F. 2d 696. The Court of Claims adopted nearly all of the Trial Commissioner's findings, disagreeing only with his legal conclusions.[2]

---

[2] The Court of Claims failed to adopt nine findings of the Trial Commissioner, Findings of Fact, 19, 20, 23, 25, 29-31, 38-39 (Pet. App. 45-48, 50-52). None of these findings was dispositive of the legal issues in the case. In addition, the Court of Claims made three findings not included in the Trial Commissioner's report, Findings of Fact, 13, 17, 41 (Pet. App. 20, 21, 31).

In the Supreme Court of the United States

OCTOBER TERM, 1973

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DONALD S. WEIR, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner enlisted in the Army after graduation from college, but soon became dissatisfied with military life and sought to end his enlistment (Pet. App. 20). Petitioner told the base chaplain that he was a homosexual. The chaplain arranged for petitioner to be examined by the Mental Hygiene Consultation Service, where he was examined by a clinical psychologist in the presence of the chief psychiatrist. Their psychiatric report detailed the case history of homosexuality provided by petitioner, diagnosed petitioner as a homosexual, and recommended that he be discharged from the Army (Pet. App. 21-23).

Petitioner was then informed that an investigation of his homosexual activity was being conducted. After being informed of his legal rights, petitioner executed a sworn statement admitting his homosexuality, de-

clining counsel and waiving a hearing before a board of officers (Pet. App. 28-29). Petitioner later executed another statement, in which he recognized the adverse effect a "discharge under conditions other than honorable" might have upon civilian life (Pet. App. 29). In October 1965, petitioner was discharged from the Army under "conditions other than honorable" and reduced in rank to the lowest enlisted grade (Pet. App. 12-13).

In 1968, almost three years later, petitioner was dismissed from his civilian employment after it was discovered that he had falsified his employment application to conceal the nature of his discharge (Pet. App. 31). Petitioner filed an application with the Army Discharge Review Board to change his discharge, in which he alleged that his 1965 statement that he was a homosexual was false. The Board found that petitioner had been properly discharged (Pet. App. 31), and his subsequent application for review to the Army Board for Correction of Military Records was denied (Pet. App. 31).

Petitioner then filed a petition in the Court of Claims, seeking a money judgment for the pay covering the remainder of his enlistment, restoration to his "rightful" grade, consideration for promotion, and the grant of an honorable discharge (Pet. App. 14). The Court of Claims, reversing its trial commissioner, unanimously upheld the decision of the Board for Correction of Military Records (Pet. App. 18). The court rejected petitioner's claim that the Army violated its own regulations by conducting an inadequate investigation of his case; it concluded that "there was no procedural violation, but rather full adherence to appropriate Army regulations" (Pet. App. 17). The court held alternatively

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-462

DONALD S. WEIR, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Although the respondent urges denial of the petition for certiorari, the stated opposition is conspicuously lacking in persuasion. What, for example, is "unreasonable" in expecting the Army to follow the clear and unequivocal language of its own valid regulation?

AR 635-89, in at least three instances provides: (1) *that individuals who seek to avoid military service by an unverifiable assertion of homosexuality will not be processed under*

this regulation;[1] (2) *that the commanding officer will inquire thoroughly and comprehensively into the matter;*[2] and (3) *that it is essential that all facts indicating homosexual tendencies or acts be recorded properly, and that signed statements of all witnesses be obtained.*[3]

Is it "reasonable" to assume that the vast investigative resources of the Army would be taxed unduly by making even a token inquiry on the post among his immediate fellow-soldiers and supervisor with whom he associated daily?[4] Is it not "reasonable" to assume that the Army's concern that homosexuals *will not be permitted to serve in the Army in any capacity* would require at least a preliminary inquiry among his daily military associates and peer group to determine whether others might also be involved? Further, what justifies respondent's conclusion that "there was absolutely no indication that plaintiff was lying"?

On the contrary, is it not more "reasonable" to assume that the Army was negligent in failing to recognize the emotional frustration and mental distress being experienced by a low-ranking enlisted man? Is it "reasonable" to assume that a senior-rank professional counsellor (Post Chaplain) would perfunctorily dismiss the personal problems of a basic soldier in emotional turmoil with less than the dignity of a personal conference in the privacy of his office? (PET 3)

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[1] Para. 2 b. (1), AR 635-89, Appendix, Page 53.

[2] Para. 4 b., AR 635-89, Appendix, Page 55.

[3] Para. 9, AR 635-89, Appendix, Page 55.

[4] Melvin H. Bonsall, the Battalion Sgt. Major, and immediate superior and duty supervisor, knew nothing about this until actual separation. Pet. Page 4.

Is it "reasonable" to assume that an "evaluation" made and prepared in its entirety by a newly-graduated and designated clinical psychologist, only routinely concurred in after-the-fact by the professional psychiatrist, can be characterized as "confirmed by psychiatric evaluation"? While the psychiatrist testified at the trial *that he could be wrong,* the psychologist declined to appear and referred all communications to his privately-retained lawyer.[5]

Petitioner submits that it is more "reasonable" to assume that the veteran trial commissioner (who ranks with and performs similar trial functions comparable to those of a Federal District Judge) who presided over an extended trial and saw and heard ten witnesses, including the psychiatrist, and who had ample opportunity to examine the documentary evidence of record, properly applied the law to the facts of the case.[6]

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[5] Both the psychiatrist and the psychologist served their obligated tours of military service and are now in private practice. No subpoena was issued for the psychologist on the advice of the commissioner stated during the trial. The psychiatrist agreed to appear at the request of the Army.

[6] A recent news-media release (*Washington Star-News,* Washington, D.C., Friday, November 2, 1973, at Page A-3, under heading of "People in the News") reports the following article concerning the Army and its policy of self-proclaimed homosexuals:

> **STRAIGHT ARMY**
>
> A self-proclaimed lesbian who is an Army WAC has come to Washington from her station at Ft. Sam Houston, Tex., to fight alleged Army discrimination against homosexuals, but she can't get the Pentagon to bring homosexual charges against her, Sp. 4 Dierdre A. Greene said, "I lived in hell for more than two years, afraid the Army was going to find out I was a lesbian." Now, the Army tells her, that she's told them all about it, someone needs to press charges. But not one has.

The respondent, in its opposing memorandum, re-writes the holding of this Court in *Thorpe v. Housing Authority,*[7] 393 U.S. 268, 276, and *Bowles v. Seminole Rock Co.*, 325 U.S. 419. Quoting the Court in *Thorpe v. Housing Authority:*

> "As we stated in *Bowles v. Seminole Rock Co. [supra]*, when considering an administrative regulation 'a court must necessarily look to the administrative construction of the regulation *if the meaning of the words used is in doubt* . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation'". [Emphasis added]

It is at this point that the facts of the instant case are clearly distinguishable, a determination made by the trial commissioner since this same argument was advanced at trial by the respondent.

Petitioner's "training at government expense" (OPP. 4) merits comment. Denied application for officers' training because of low mechanical aptitude, he was nevertheless assigned to power generator mechanics' school for which he had neither aptitude nor interest. Despite satisfactory completion of the course, plus an additional advanced course, no assignment to duty in this occupational specialty was ever forthcoming for him. (APP. 44) His sole duty, following this training, until rescued by the Sergeant Major for clerical duty in the battalion orderly room, was custodial clean-up work on the post.

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[7] Cited in accord: *Udall v. Tallman,* 380 U.S. 16 (1965).

Contrary to respondent's contention that "the court correctly applied settled principles of equitable estoppel" (OPP. 4), it is imperative that the trial commissioner's well-reasoned discussion and determination of this point be examined (APP. 42, 43). It should be noted that the two cases relied on by the respondent in its opposition are cited (with others) by the trial commissioner in arriving at a directly opposite result.

Finally, in representing that *due process in the instant case is not violated by Rule 147 (b) of the Rules of the Court of Claims,* the respondent does not cite any authority from this Court in support of their contention. Significantly, the Court of Claims decision cited by the respondent, *Hebah v. United States,* 197 Ct. Cl. 729, a per curiam decision of 1972, provides as follows:

> "Under our rule, the commissioner's findings of fact are presumed to be correct because of his opportunity to hear the witnesses and to determine the weight to be accorded to their testimony. A party who undertakes to overcome this presumption must make a strong affirmative showing to the contrary." (Citations omitted)
>
> "Although the presumption does not extend to the conclusions of law made by the trial commissioner, he saw and heard the witnesses and had a much better opportunity than the court to familiarize himself with all of the circumstances involved. In the light of this situation and a consideration of the record, we find that under the peculiar facts and circumstances of this case, his conclusions

are not unreasonable or unwarranted by the record."

It is precisely on this point that the petitioner is respectfully urging this Court to make a final determination of the issue. In the absence of a controlling decision by this Court on a rule which closely parallels Rule 52 (a) of the F.R.C.P., and with the ever-increasing scope of activity affecting a broader spectrum of litigants in the Court of Claims, a final determination on the point by this Court is imperative.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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8 November 1973